

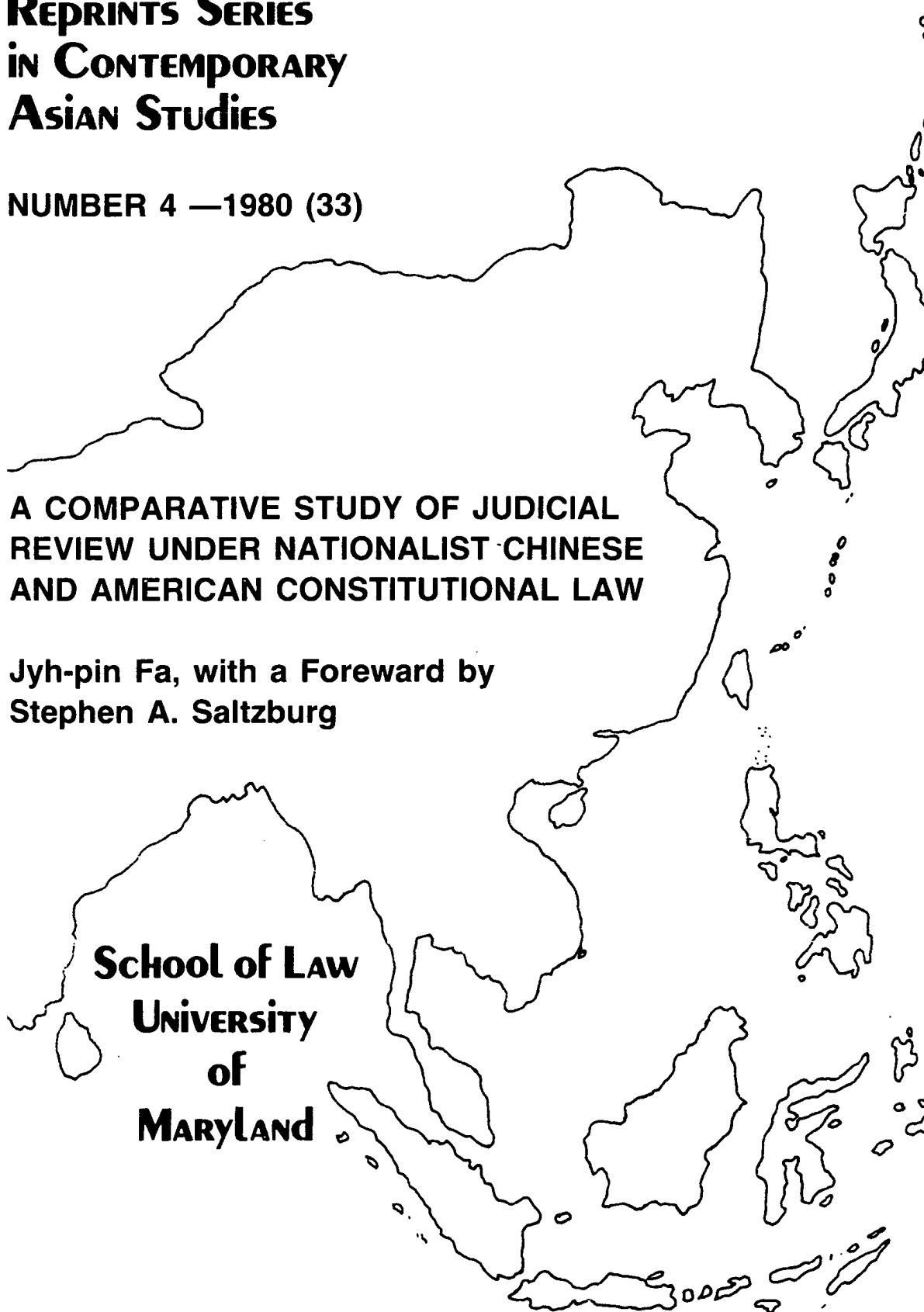
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**A COMPARATIVE STUDY OF JUDICIAL
REVIEW UNDER NATIONALIST CHINESE
AND AMERICAN CONSTITUTIONAL LAW**

**Jyh-pin Fa, with a Foreward by
Stephen A. Saltzburg**

**School of Law
UNIVERSITY
of
MARYLAND**



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FOREWORD

When Chief Justice Marshall wrote for the United States Supreme Court in *Marbury v. Madison* (1803) that the judiciary had the power to declare an act of Congress unconstitutional, he phrased the issue before the Court this way: "The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but happily, not of an intricacy proportioned to its interest." By assuming in this statement of the question that courts have the power to review legislation in order to decide whether it actually is repugnant to the Constitution and focusing instead on whether a law known to be unconstitutional nevertheless could be valid law, Marshall verbally sidestepped the truly hard question: why should courts have the power to set aside statutes acts enacted by a body, the legislature, that is presumed to be as loyal and subservient to fundamental law as the courts themselves? This truly is a question whose intricacy is directly proportional to its interest. It is a question that American constitutional lawyers ponder regularly as they endeavor to explain and to criticize the role of the courts in our constitutional system. Other aspects of American judicial review — for example, review of executive action and review of the federal constitutionality of state laws are now somewhat less controversial than review of congressional action — but any exercise of judicial power to nullify actions of popularly elected officials still is likely to cause some concern.

Judicial review, if still controversial, is so well established in the United States that we often forget how special our concept of the judicial role is. In many countries throughout the world, there is neither a written constitution nor anything resembling judicial review of the validity of laws. In other countries a written constitution exists but judicial review of legislation under the constitution is not exercised. Yet, it seems that judicial review of some sort is more common today than ever before. In some places, a special constitutional court performs this function. In others a court, more like ours, with broader jurisdiction, performs the task. Whatever the approach, more courts are entrusted with authority to assess whether law is in accord with fundamental or constitutional principles.

What seems evident is that judicial review is not a uniform concept, even in one country. It is only in the last half-century, for instance, that the United States Supreme Court has been so strongly identified with the protection of personal liberty. In the early days of the nation, judicial review was more important in the effort to

strengthen the union against the states and to recognize federal power to promote commerce and general welfare. It is only against a background of America's relative world power and economic prosperity that judicial review to protect fundamental rights and vulnerable minorities has developed.

This book compares judicial review and the role of the courts in the Republic of China with American ideas about the responsibility of courts. The authors describe the way in which courts function in the Republic of China, and in necessarily condensed fashion, how this came to be. They described and explain the Constitution of the Republic of China and trace its roots. And they carefully detail the composition and function of the Chinese equivalent of our Supreme Court, the Council of Grand Justice of the Judicial Yuan.

The work of the Chinese court for the most part has not involved protection of personal liberties. This is not surprising. For some time concern about security against outside aggression and the competitiveness of its exports in world markets have dominated public affairs in the Republic of China. Until political and economic security are assured, it may be that no judiciary is likely to stand in the way of legislative and executive officials responsible for the security and prosperity of the nation. Judicial review that entails the power to frustrate the temporary will of lawmakers and lawenforcers may be a luxury that a country only can afford when it is strong enough that any particular frustration of majority will is not likely to jeopardize its position — politically, militarily, or economically — in the world.

Judicial review is still relatively new in the Republic of China. By watching how it grows with the economic prosperity of the nation and how it is affected by developments in the relationship between the Republic of China and the People's Republic on the mainland, we may learn much about the impact that political and economic forces have on the role of the judiciary.

Stephen A. Saltzburg
September 10, 1980

PREFACE

Following the Second World War, a conspicuous phenomenon in the legal systems of many countries has been the adoption of a system of control legislation. Judicial review, once characteristic solely of the United States, has spread to many parts of the world; as the system has spread, it has assumed a variety of forms. Particularly noteworthy is the rise of the European system, represented by West Germany and Italy; this system, in fact, is modeled after the Austrian system of 1920. By creating a special Constitutional Court, it stands in contrast to the American type in many respects.

This development has made the comparative study of judicial review more meaningful. In this paper I examine the Chinese system of judicial review with two purposes in mind: one is to see how it is organized and functions; another is to analyze problems that it has encountered in the last three decades and the responses it has proposed for settlement. This is a case study of an American judicial system operating in the foreign context of Chinese law and politics.

This study owes much to many people. The untiring patience and numerous suggestions of Professor Stephen A. Saltzburg are warmly appreciated. I also thank Professor Saltzburg for his kindness in writing a foreword for this book. Acknowledged, too, is the help of Professor John Norton Moore, who arranged the necessary financial support for me from the Graduate Program of the Virginia Law School during 1977-1979. I also thank Professor Kenneth Redden for his valuable assistance throughout my work on this project. Professor Calvin Woodard also has my appreciation for his unprecedented decision to accept both myself and my wife as participants in the Graduate Program in 1975.

My heartfelt thanks, long overdue, go to Professor Hundgah Chiu of University of Maryland School of Law, whose abiding interest in my scholarly activity during the past ten years is greatly appreciated. The good counsel — solicited and unsolicited — from Professor and Mrs. Shao-chuan Leng of the University of Virginia are warmly appreciated. I am also grateful to Mr. David Simon and Professor David Bogen of the University of Maryland School of Law for reading my manuscript and offering many constructive criticisms, to Mr. Mark Robson for compiling the index, and to Julia Fang for administrative work in connection of publication.

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Jyh-pin Fa
Taipei, Taiwan
Republic of China
September 15, 1980

A COMPARATIVE STUDY OF JUDICIAL REVIEW UNDER NATIONALIST CHINESE AND AMERICAN CONSTITUTIONAL LAW

by Jyh-pin Fa

CHAPTER I

INTRODUCTION

It is well recognized in the modern world that the doctrine of rule of law¹ is the best protection offered for individual liberty. The concept of the rule of law is the establishment of a hierarchy of normative rules in the political system. To be more specific, the regulations issued by the local government must conform to the laws of the state or province, and those of the latter to the laws of the nation. The decrees and resolutions of administrative organs should not overstep the limits imposed by the statutes that provide for them. Further, the epitome of this concept is the notion that any law must be in harmony with a paramount constitution. It is from this notion that the theory of judicial review arises. According to Professor Abraham, judicial review is "the power of any court to hold unconstitutional and hence unenforceable any law, any official action that it deems . . . to be in conflict with the Basic Law, in the United States its Constitution."²

Judicial power to invalidate unconstitutional law represents a major shift of political development from the principle of majority

1. According to Albert Ven Dicey, the internationally known British constitutional lawyer, the rule of law "has three meanings, or may be regarded from three different points of view": controls are exercised through regular law instead of arbitrary power; the law of the land is administered by the ordinary courts of law equally for all people; constitutional law is not the source but the consequence of the rights of individuals, as defined and enforced by the courts, that, in short, the constitution is the result of the ordinary law of the land; *see* A. DICEY, *INTRODUCTION TO THE STUDY OF THE CONSTITUTION* 202-03 (10th ed. 1959). Because the last meaning is derived from the English tradition that ordinary law and a constitution cannot be separated, it is open to serious doubt that this may equally be applied to other countries. For a criticism of this definition, *see* W. JENNINGS, *THE LAW AND THE CONSTITUTION* 305-17 (5th ed. 1959).

2. H. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE* 280 (3d ed. 1975).

rule to the principle of limited rule. Since provisions of a constitution are generally rather limited while their applications in particular circumstances are not certain, controversy will inevitably arise during the law-making process in the legislative or administrative government agencies as to whether these statutes are in conformity with the constitution. When they began the process of democratization in the last century, almost of all of the European countries viewed the legislature as the suitable organ to guard the inviolability of the constitution.³ After independence, the United States took a different direction by arming the judiciary with the power to review the constitutionality of statutes passed by the legislature.⁴

3. Under the immeasurable influence of the *volonté générale*, Rousseau's version of popular sovereignty, continental European countries were hardly allowed the opportunity to use a legal check like judicial review. The sovereignty was transferred from the monarch to the people who in turn delegated to their representatives. Furthermore, judges in those nations traditionally did not enjoy independent status and served as an instrument of the monarch's exercise of cabinet justice. For a brief discussion, see Dietze, *America and Europe — Decline and Emergence of Judicial Review*, 44 VA. L. REV. 1233, 1238-41 (1958).

Although as early as 1610, Lord Coke of England in *Dr. Bonham's Case* [8 Co. Rep. 113b at 118a, 77 Eng. Rep. 646 at 652, C.P. 1610], emphatically declared that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void. . . ." For comment on this case, see Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30-70 (1926). The doctrine of the parliamentary supremacy of sovereignty nevertheless, was firmly established after the Glorious Revolution of 1688. The opinion voiced by Blackstone that "what the Parliament doth no authority upon earth can undo" replaced Coke's *dictum*; see 1 COOLEY, BLACKSTONE'S COMMENTARIES, 161 (2d ed. rev. 1872). An oft-quoted metaphorical aphorism stated by De Lolme best illustrates this absolute doctrine: "Parliament can do everything except make a man a woman or a woman a man" quoted in E. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW*, 87 (1955). For the study of the supremacy of the legislature, see Mitchell, *Sovereignty of Parliament — Yet Again*, 79 L.Q. REV. 196 (1963).

4. This is because during the American Revolution, the English Parliament, rather than the King, appeared to be the great oppressor. Its various acts, imposing discriminative treatment upon American colonies, thus constituted the major source of resentment of English dominance. Accordingly, the conditions existing in America differed from those in European nations and were conducive to the adoption of judicial review in America and its rejection in Europe.

The greatest advocate for the adoption of judicial review in this new nation was Alexander Hamilton, who in his famous Federalist No. 78 laid out the reasoning that Chief Justice Marshall followed fifteen years later in *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803), the epoch-making decision in the history of judicial review. Another prominent American Founding Father, James Madison, the so-called "Father of the Constitution," also supported the adoption of judicial review; see C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 740 (1937). Even Thomas

Although the proposal of a court with authority to determine the constitutional validity of a statute is not a purely American idea,⁵ it cannot be denied that this system has survived over more than a century and constitutes the most striking feature of the American political structure. It may even be appropriate to say that the doctrine of judicial review is the most valuable contribution to political theory made by America. All agree that America became the model for those countries considering the establishment of a constitutional government.

Jefferson, who hardly could be classified as an admirer of judicial review, nevertheless favored some degree or type of judicial control. He wrote Madison from Paris in 1789, two years after the drafting of the Constitution, that one good reason for adding a Bill of Rights to the new Constitution was "the legal check which it puts into the hands of the judiciary." 14 THE PAPERS OF THOMAS JEFFERSON 659 (J. Boyd ed. 1950). Further, before and after acquiring independence, a number of state courts actually practiced the power of judicial review. For a discussion of state precedents, see C. HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 88-121 (2d ed. 1932). Some scholars also asserted that most of the delegates at the Constitutional Convention in Philadelphia in 1787 favored judicial review; see C. BEARD, THE SUPREME COURT AND THE CONSTITUTION 46-79 (1912); E. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 10-12 (1914); Beard, *The Supreme Court — Usurper or Grantee?* 27 POL. SCI. Q. 1 (1912). However, a critique of these historical assertions can be found in L. LEVY, JUDGMENTS 25-32 (1972).

5. Charles Warren in CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT vii (1935) argues that "just as a written Constitution amendable only by the people was wholly an American idea, so the proposal of a court with authority to determine when Congress had overstepped the bounds set by the Constitution and to curb attempts by Congress to amend or alter the Constitution was purely American." This is supported by C. Friedrich; see THE IMPACT OF AMERICAN CONSTITUTIONALISM ABROAD 92 (1967). However, a close examination of the historical material indicates that this conclusion seems doubtful. Some political philosophy in Greece and Rome implied that political rulers are and should be subjected to an order of higher law. The prevailing doctrine during the Middle Ages was the supremacy of natural law. Positive law was invalid and should not be applied by the courts if it conflicted with the former. For a survey of the theoretical background of the development of judicial review, see M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 28-44 (1971); E. CORWIN, *supra* note 3; C. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS (1930); C. McILWAIN, CONSTITUTIONALISM OF ANCIENT AND MODERN (1947); Radin, *The Judicial Review of Statutes in Continental Europe*, 41 W. VA. L.Q. 112-30 (1934); Cappelletti & Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207, 1209-10 (1966).

These ancient and medieval political philosophies doubtless contributed to the emergence of modern judicial review even though there is not sufficient concrete evidence to attribute the development of the latter to the former; see Deener, *Judicial Review in Modern Constitutional Systems*, 46 AM. POL. SCI. REV. 1079, 1080 (1952).

This viewpoint was much more obvious after World War II. Almost one-half of the nations of the world had by then officially adopted some form of judicial review. The bitter experience of most European countries with dictatorial regimes made them eager to try to find an effective way of dealing with the abuse of government power. Not only had legislatures been unable to prevent repressive actions from being carried out, but, ironically, repressive regimes often obtained their power through the legislatures.⁶ Hence, the loss of faith in the legislature's capacity to serve as a guardian of the constitution is understandable.

Since the United States emerged from the war as a leading power and seemed to maintain a comparatively stable democratic system, it was quite natural for those defeated countries to view the United States not only as a military liberator, but as the best model of democracy and its virtues. One principal characteristic of democracy was its guarantee of fundamental rights; in the United States it was the great emancipator from majoritarian despotism. And judicial review was the fundamental aspect of the emancipation. Moreover, the United States made known its "expectations" that the defeated countries would reform their political and legal system. They took these "recommendations" seriously.⁷

America also has been a model for newly emerging nations. Even as United States commercial law has been vigorously studied by a large number of foreign scholars as a result of her leading position in international trade and investment, so too can the lessons of her constitutional experience be easily identified in almost every constitutional work of other countries. It is fair to say there is no other aspect of the American legal system that has been probed so deeply and extensively as her constitutional law.

6. Hitler, Mussolini and Petain all received plenary power from their legislatures through the formal legislative procedure; see Dietze, *supra* note 3, at 1233, 1255, n.88.

7. However, a German constitutional authority, Rudolf Katz, who was the Vice President of the Federal Constitutional Court until 1961, categorically denied that there was a necessary causal relationship between original Allied demands and final German action. Instead, he argued that the adoption of the judicial review was favored by all democratic parties and groups after World War II and thus it was the Germans themselves made up their mind; see *Bundesverfassungsgericht und U.S.A. Supreme Court*, 7 DIE OEFFENTLICHE VERWALTUNG 98 (1954), cited in Cole, *The West German Federal Constitutional Court: An Evaluation After Six Years*, 20 J. POL. 278, 281-82 (1958). There is no concrete evidence to show the direct pressure exercised by

Nevertheless, each country has its own distinctive cultural and historical background; the political and social conditions of few countries are identical. Recognizing this diversity, no country follows the American example in all respects, although often the American form of judicial review is very influential. But it does not always take the form to which Americans are accustomed. One important structural difference lies in the fact that some countries separate the constitutional court from the hierarchy of ordinary courts. This is a significant development from the establishment of the system of judicial review, because it presents an alternative means of guarding the constitution.⁸ China adopted this alternative approach. The underlying reasons for creating this different system are many and will be dealt with at length in Chapter IV. The implications associated with this important departure are also covered there.

Compared with the abundant material about the constitutional courts in West Germany, Italy, and Austria, with the Supreme Court of Japan and with the Constitutional Council of France (which is said only to possess rather limited review functions), the work of the

the United States upon them to adopt judicial review as a way of promoting a democratic way of life. Henry Abraham maintained, however, that the establishment of the Federal Constitutional Court in West Germany was the result of the United States insistence; see ABRAHAM, *supra* note 2, at 299.

In the case of Japan the conclusions reached by foreign and Japanese constitutional scholars are the same. That is, the present Constitution reflects the enormous influence of the American notion of constitutionalism. It might even be said that it was virtually drafted by the hands of the Occupation Authorities; see H. QUIGLEY & J. TURNER, *THE NEW JAPAN* 94 (1956); McNelley, *The Japanese Constitution: Child of the Cold War*, 74 *POL. SCI. Q.* 176, 185 (1959). For a vivid description about strong American pressure upon the Japanese; see C. WHITNEY, MacARTHUR: HIS RENDEZVOUS WITH HISTORY 250-52 (1956). It is thus natural that the doctrine of judicial review is explicitly recognized in article 81, which provides that "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation of official act." Williams, *Making the Japanese Constitution: A Further Look*, 59 *AM. POL. SCI. REV.* 665-79 (1965).

8. Austria was the first country which established the archetype of this alternative according to her 1920 Constitution. The well-known Austrian jurist Hans Kelsen was the most influential figure in the drafting of this document. For a concise introduction to the Austrian system of judicial review, see Grant, *Judicial Review of Legislation under the Austrian Constitution of 1920*, 28 *AM. POL. SCI. REV.* 670-76 (1934); Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitution*, 4 *J. POL.* 183-200 (1942).

Council of the Grand Justices in China is entirely ignored. As a Chinese student interested in constitutional law, I hope to bring the work of the Grand Justices to the attention of international constitutional scholars. The Chinese experience will add to the richness of current inquiries about the legitimacy and proper scope of judicial review.

The absence in the legal literature of an examination of Chinese constitutional law is explained by the recent development of Chinese judicial review. The terms "constitution" or "constitutional law" can be found in ancient Chinese books, which were published not only before *Marbury v. Madison*, but also before America had been discovered by Europeans. But it would be misleading to conclude that China was the pioneer in the establishment of constitutional government, because these terms do not bear modern meaning and significance. In ancient books the term "constitution" only designated various laws and ordinances promulgated by the Imperial Court.⁹ As a matter of fact, law in traditional China never assumed a prominent role. After Confucianism was firmly established two thousand years ago, Chinese legal theories and practices in the dynasties that followed were virtually governed by the concept of rites, because Confucians advocated government by gentry and maintained that people should be governed by a system of ethics rather than by law. China, however, has had various legal codes during her long history, but never a constitution.

Until the beginning of this century, the Chinese were totally unfamiliar with constitutional rules. This situation began to change in the beginning of the twentieth century when the last monarchy in Chinese history, the Ching dynasty, was forced by unceasing revolutionary movement and the world-wide trend toward constitutionalism to overhaul its political system. Because the people were dissatisfied with the delay and the slowness of this political reform, a large-scale revolution erupted in 1911 and overthrew the Ching dynasty. Even after the establishment of the first republic in Asia, the following political development did not pave the way for

9. In theory, the monarch in traditional China was the head of state whose authority was subjected to no limitations except those imposed by God. Thus, the limitation on the exercise of governmental power, which is the cardinal element of constitutional government, is absent. However, the emperor actually was under a number of restraints; this phenomenon may in some way approximate the meaning of modern constitutionalism. For those limits on Chinese royal power, see F. HOUN, *CHINESE POLITICAL TRADITION* 45-98 (1965).

establishing a constitutional government in China. The existing conservative politicians and military simply did not believe in constitutional rule. They fought each other in every part of the country in order to seize as much power as possible. As many as three constitutions and four constitutional drafts were promulgated during the next seventeen chaotic years. Since those drafts and constitutions either were drafted by the constitutional commission, whose members were backed by a warlord who happened to occupy Peking, or were never put into practice, their significance has been minimized by many students of Chinese constitutional law.

Less than ten years after the unification of the whole nation under the leadership of the Nationalist Party in 1928, the short period of peace was shattered by the Japanese. Only after World War II did China, along with other newly independent nations, have its first "legitimate" Constitution, which was made and promulgated by the National Assembly on December 25, 1946 and became effective as of January 1, 1947. The process of making this constitution was not a simple one and will be described in full in the next chapter.

The power of judicial review was explicitly recognized and entrusted to a special organ, the Council of Grand Justices.¹⁰ The Council did not, however, function until the Nationalist government moved to Taiwan three years later. Compared to the American experience, it is no exaggeration to say that judicial review in China is in its infancy. Thus, a study comparing Chinese institutions and those of the leading democratic countries has the potential to benefit China, because she can assimilate the wisdom that the experience of other countries has generated and avoid the problems in which some more experienced countries still find themselves entangled.

In this paper I hope to contribute to the ultimate realization of this potential, but I recognize that China cannot borrow wholesale from other countries and other customs. If judicial review is to be not only transplanted to China, but is also to work, it must be adjusted to the local customs of the world's oldest civilization. It will be important in the remainder of this paper to see how the American concept of judicial review must be changed to suit Chinese culture.

10. Article 78 provides: "The Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders." The following article 79, paragraph 2 provides: "The Judicial Yuan shall have a certain number of Grand Justices to take charge of matters specified in article 78 of this Constitution, who shall be nominated by the President of the Republic." The functions and structures of Judicial and Control Yuan and other governmental organizations will be fully dealt with in the next chapter.

Also important is the question whether judicial review in its Chinese form has itself changed the culture of this ancient land.

After tracing the historical development of the Chinese political and legal system and studying the influence on the current governmental structure and the people's attitude towards the government, I shall examine the organization and function of the constitutional framework in which the Council of Grand Justices, ordinary courts, and also the administrative courts operate. Then I shall discuss the actual practice of, and some of the most far-reaching decisions rendered by, the Council. I will compare them with their American counterparts in the hope of discerning significant differences and the underlying reasons for them. Finally, I will deal with the impact of the constitutional decisions, a subject that is important, controversial and too often ignored in analysis of systems of judicial review.

CHAPTER II

Background of the Chinese System of Judicial Review

A. Confucianism v. Legalism

It may be an exaggeration to say, as historians usually seem to do, that the best way to understand anything of importance about the present is to know everything about the past. Still, one cannot deny that some aspects of the past do influence, sometimes rather significantly, the contemporary life of every country. As China has a long recorded history of over three thousand years, a study of the legal thought and system prevalent in traditional China is absolutely necessary for a better understanding of the modern Chinese state. In addition, traditional Chinese legal practices and conceptions about law deserve special attention, since in many ways they sharply differ from those of other civilizations. It might even be suggested that the difference between China and other civilizations is nowhere so clearly manifest as in the domain of law. Accordingly, a few words about the theory, development, and special features of Chinese law are necessary before we discuss the practical administration of justice.

Like its political philosophies, China's most influential legal philosophies, which signified conscious reflections on the nature and end of law, seem to have made their appearance, to have grown, and to have diversified during the sixth and third centuries B.C. The period was characterized by the conflict between Confucianism's and Legalism's differing conception of government, the one espousing a belief in "government by men," the other trusting in "government by law." Because the Confucian school firmly believed that the people could be influenced through moral education exerted by someone at the top, ethics was the principal regulator of human conduct and virtue the chief requirement of the rulers.¹ In addition, the doctrine of

1. *E.g.*, Confucius said, "The people [are] like grass, the ruler like the wind, as the wind blows, so the grass will be inclined." *THE ANALECTS OF CONFUCIUS*, Book 12, ch. 19, at 168 (A. Waley trans. 1938). Mencius, the great Confucianist second only to Confucius, also said, "When the ruler is benevolent, all will be benevolent, when the ruler is righteous, all will be righteous, when the ruler is correct, all will be correct," J. LEGGE, *CHINESE CLASSICS II*: 186 (1870).

the mandate of heaven² and the right to rebellion³ all contributed to the emergence of the conception of "government by men," because the people were not bound to obey tyrants; that is, emperors' unwise behavior and bad fortune were taken as evidence that they had lost their celestial mandate to govern. Such principles called for a government of men rather than of laws. Legalists, on the other hand, denied that moral influence could determine the social order and could alone create order within the state. They strongly rejected any "government by men" principle, simply because it would be precarious. What they wished to produce was a system of law before which all men were equal and through which proper social behavior would be inculcated by means of severe penal sanctions imposed by the state regardless of the person involved.⁴

2. This doctrine was said to have originated in the early Chou period (1000-771 B.C.). As a border nation militarily dependent on the Shang state, Chou finally overthrew the latter and justified this conquest by invoking an elaborate doctrine in which the emperor retained his mandate from heaven by displaying virtue and the capacity to exercise a benign heaven's will. Once the emperor proved incapable of doing this, he would be responsible to heaven for the disturbance of the natural harmony. Consequently, the mandate would be withdrawn and might even be transferred to another. Heaven's will was made known by way of the saying: "Heaven looks accordingly as the people look and heaven listens accordingly as the people listen." This indicates that the "heavenly mandate" was not a family property to be inherited from one generation to another as was the general practice. It might become negated as soon as one's virtue waned. The saying also means that the virtue and the ability of the emperor were measured by the degree of satisfaction of the people under his rule. A letter by Kuang-we, founder of the Later Han dynasty, provides a better illustration of the impermanence of the heavenly mandate. Addressing King-sun Shu after having restored the throne which was usurped by Wan Mang from an infant sovereign of the Former Han dynasty, Kuang-we wrote that despite its recent restoration, the Han dynasty, like all its predecessors, would eventually come to an end since mandates of heaven are never meant to be permanent. F. HOUN, *CHINESE POLITICAL TRADITION* 8 (1965).

3. The doctrine of the mandate of heaven obviously implied a right of rebellion. It was the last but effective resort of the populace against the tyrannical government. People justified their rebellion by claiming that heaven's mandate for the existing dynasty had been revoked. The success of their rebellion would thus legitimize the establishment of a new dynasty. We shall bear in mind that it is erroneous to say the right of revolution instead of rebellion. Centuries of authentic Chinese history have shown that when political disaffection developed it did not take the form of a demand that the system of government be drastically changed until 1911. In other words, the Chinese people were traditionally concerned only with the personal character of the rulers who held the reins of authority. Meadows, in his old but still valuable work, concluded that the Chinese are the least revolutionary and the most rebellious; see T. MEADOWS, *THE CHINESE AND THEIR REBELLIONS* 25 (1953).

4. *E.g.*, Han Fei Tzu said: "To put aside laws and to rely upon one's heart in governing would make it impossible even for Yao [the king in ancient time to whom

However, the concept of law employed by the Legalist differed from that of the West because the former had such a narrow view of human nature: in order to produce an effective system of law which was powerful enough to suppress feudal privilege at home and eliminate rival kingdoms abroad, only two motives needed to be reckoned with; namely, fear and profit. Thus, the Legalist's belief in the overriding importance of punishment and reward to ensure good government was inevitable.⁵ The idea of subjective human rights was totally unknown to these partisans of positive law, although they ardently advocated the equality of individuals before the law.

Like many other reformers and great thinkers, Confucius was frequently ridiculed by people of his own day, and his lofty ideas were never given the opportunity to be put into practice. This may be due in large part to the constant warfare which many countries fought in order not only to preserve their own existence, but also to make themselves strong enough to subdue their neighbors. Society was disordered and the relationship between people and government was fragile. Under the circumstances, the moral ethics expounded by Confucianism were indeed unrealistic. Legalism doubtlessly was better suited to the needs of these rulers, for it required people to do everything to contribute to the strength of the state by clearly defined and impersonal commands and penalties. Hence, the Legalists held the advantage in the actual battles of that time. By adopting those dynamic and ruthlessly efficient programs designed by the Legalists, the Chin dynasty finally unified China. However, the excessive use of manpower to build the Great Wall and other magnificent buildings made the people intolerant. The infamous "burning of the books and

Confucious attributed many virtues] to rectify a country." I W. LIAO, *THE COMPLETE WORKS OF HAN FEI TSU* 269 (1959). Also, the Lord of Shang said: "What I mean by the unification of punishments is that punishments should know no degree or grade, but that from ministers of state and generals down to great officers and ordinary folk, whosoever does not obey the king's commands, violates the interdicts of the state, or rebels against the statutes fixed by the ruler, should be guilty of death and should not be pardoned." J. DUYVENDARK, *THE BOOK OF LORD SHANG* 778-79 (1928).

5. One leading contemporary philosopher, Fung Yu-lan, elaborated this by saying:

In ruling the world, one must act in accordance with human nature. In human nature there are the feelings of liking and disliking, and hence rewards and punishment are effective. When rewards and punishment are effective, interdicts and commands can be established, and the way of government is complete.

See Y. FUNG, *A SHORT HISTORY OF CHINESE PHILOSOPHY* 162 (D. Bodde ed. 1948).

burying of the scholars" in which Confucian classics were burned and scholars of the Confucian faith were buried alive led to a break with the intellectuals. Under the circumstances the Chin dynasty was short-lived and overthrown within twenty years by the Han dynasty.

B. Confucianization of Law

The failure of the Chin dynasty vastly enhanced the prestige of Confucian teaching. During the reign of Wu-ti, at the advice of Tung Chung-shu, Confucianism was exalted, to the denigration of other schools of thought. It is said that from that time until 1911 Chinese political and legal thought was dominated by Confucianism.⁶ This statement is based more on appearance than on fact. The Confucianism which now became the accepted orthodoxy was subtly transformed somewhat into an amalgam which included substantial parts of Legalism. Institutions of law and organizations with which Legalism was identified survived into the next Han dynasty and thereafter, in an exceptional symbiosis with those belonging to the classical Confucian order. This might be the result of the Confucianists' realization of the necessity and advantages of the administrative machinery established by the Chin dynasty for the actual conduct of public affairs. This Chin structure was vital to the maintenance of a centralized government.

The survival of the Legalist structures and laws also occurred because legal sanctions were never rejected totally by the Confucianists from the very beginning; they only objected to replacing moral influence by punishment. Mencius succinctly pointed out, "Virtue alone is not sufficient for the exercise of government, laws alone cannot carry themselves into practice."⁷ As time passed, the supplementary function of punishment was increasingly emphasized by the Han Confucianists. Wang Tu was quoted as saying, "When law and order are operating, there will be good government; when law and order are by-passed, the nation will be in disorder."⁸ Practically speaking, some economic policies adopted by the government such as "governmental monopolies of salt, iron and other products, or

6. The other reasons contributing to the long dominance of Confucianism in Chinese political arena are that it was most conducive to the maintenance of monarchical institution; that the right of rebellion was used only as a last resort; that the works of Confucius were employed as subjects of ancient historical, political, and moral essays in the competitive civil service examination, etc. For a more detailed study, see P. HSIEH, *THE GOVERNMENT OF CHINA (1644-1911)*, at 12-15 (1923).

7. LEGGE, *supra* note 1, at II: 65.

8. T. CH'Ü, *LAW AND SOCIETY IN TRADITIONAL CHINA* 272-73 (1961).

ever-normal granary, various government efforts to equalize private holdings of land, all probably owed as much or more to Legalism than they did to early Confucianism."⁹ Even the civil service examination, which has traditionally been thought to be a peculiarly Confucian institution, was challenged as a Legalist invention.¹⁰

Fully recognizing the value of Legalism, the Confucianists in the Han dynasty and thereafter worked out a legal system in which the polarity of law and morality was embodied in the same code. The result was a legalization of morality or the Confucianization of law.¹¹ In other words, these Confucianists adopted from Confucianism the substance of moral duties, while from the Legalists they adopted the procedure of enforcing those duties. This process began during the Han period and gradually matured in the Tang dynasty (618-916 A.D.), whose code is clearly and succinctly expressed:

Virtue and morals are the foundation of government and education, while law and punishments are the operative agencies of government and education. Both the former and the latter are necessary complements to each other, just as it takes morning and evening to form a whole day, and spring and autumn to form the whole year.¹²

The natural consequence of such synthesis is that moral duties are *ipso facto* legal duties in the sense that the law sanctions them by penalizing their breaches. Whatever is immoral is not only illegal but a criminal offense.¹³

Under the dominance of such ideology, civil law could hardly have evolved in traditional China. Even a debtor who failed to discharge his obligations was made punishable with flogging in addition to being compelled to pay the full amount owed. Therefore, not until recently can the Chinese be said to have developed any

9. D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA* 28 (1967).

10. Creel, *The Meaning of Hsing Ming and the Fa-Chia: 'Legalists' or Administrators'?*, 4 BULL. INST. HIST. & PHILOLOGY 607-36 (1961).

11. See CH'Ï, *supra* note 8, at 267-78.

12. Vol: 1 Chap. 1 at 11a. For English translation see THE TANG CODE 54 (W. Johnson trans. 1979).

13. A catchall of Confucian moralism provides: "Whoever does anything which he ought not to have done is punishable with 40 blows light flogging; and when the impropriety is of a serious nature, 80 blows heavy flogging." Vol: 10, art. 450.

considerable body of civil, as distinguished from criminal, law.¹⁴ The code in each dynasty, without exception, dealt exclusively with questions of criminal and administrative law; questions of family, succession, and other areas of private law were mentioned only in connection with criminal or administrative law.¹⁵ This marked a sharp contrast to the development of law in Europe, where the great compilations of Roman jurisprudence were concerned primarily with the institutions of private law.

In this connection, it is helpful to give a brief historical development of Chinese written codes. Leaving aside the studies on the semi-historical period and the legal reference in the Book of History, important as these are to the historian, we come to firm ground in the period of the "Warring Kingdom," which was also characterized as a period of competition for a variety of philosophies like that mentioned above, with the publication of the Code of Six Chapters edited by Li Kwei of the state of Wei. The Six Chapters dealt respectively with (1) theft, (2) brigandage, (3) imprisonment, (4) procedure, (5) various enactments, and (6) definitions. From this time forward those elements that were to make up the traditional composition of the various dynastic codes began to appear. The Han dynasty added three chapters to the existing code, dealing respectively with murder, mortal wounding, and a different type of theft. After the Han, only a few dynasties added notably to the volume and quality of the legal literature of China. During the Tang dynasty, a very comprehensive and, at least according to the ancient standard, quite systematic code was enacted.¹⁶ Since the older codes had been lost save for chapter headings or fragments, the Tang Code was the

14. This can be substantiated by the finding of one of the best known Sinologists, E. H. Parker: "In the whole history of China, I have not come across a single case of civil jurisprudence in the strict sense, *i.e.*, where any abstract rights between individuals have been thrashed out with considerations touching relevancy of evidence, damage to character, equitable set-off, nice definitions in contract, and so on." E. PARKER, *CHINA: HER HISTORY, DIPLOMACY AND COMMERCE* 327 (1917).

15. However, the district magistrate did dispose of civil cases arising from the failure of mediation, and the financial commissioner of the provincial government as well as the Board of Revenue at the national capital handled the appeal cases. As civil cases generally never reached the highest court and thus could not be found in the usual compilation of cases, not a few scholars have had the misconception of the non-existence of civil cases in the Chinese courts. See Buxbaum, *Some Aspects of Civil Procedure and Practice at the Trial Level in Tanshui and Hsinchu from 1789-1895*, 30 J. ASIAN STUD. 255, 262-63 (1970).

16. It is important to note here that Wallace Johnson recently completed a translation of the general principles of the Tang Code, which is a major contribution to the study of Chinese legal history. See Johnson, *supra* note 12.

first in which the full text was preserved. The high quality of the Tang Code made it a worthy model for all the codes of the succeeding dynasties; in fact, the series of these codes was said indeed to present a remarkable continuity of provisions.¹⁷ In addition, the Tang Code had great influence even beyond the confines of China; Japan borrowed it as the very model for her "Ta Pao Code." The most recent and the last code of imperial China that is also marked by its exhaustive substance and systematic form is the Code of the Ching dynasty, also known as Ta Ching Lu Li.¹⁸

Since the ministers entrusted with the task of drawing upon codes of law in the various dynasties were all scholars well versed in the Confucian classics as a result of the civil service examination, these ministers consciously or unconsciously seized the opportunity to

17. D. BODDE & C. MORRIS, *supra* note 9, at 59; see also J. ESCARRA, CHINESE LAW AND COMPARATIVE JURISPRUDENCE 16 (1926); Cheng, *Fragments of Chinese Law Ancient and Modern*, 1 CHINESE CULTURE 1:1, 7 (1958). *Contra*, a highly qualified Chinese author, Hsieh Yun-sheng, a former President of the Board of Punishments who devoted a life-long study to problems of Chinese law, declared that there is a considerable difference between the Tang and the Ming (1364-1644 A.D.) codes, the latter having undergone the influence of the law during Mongol times (1271-1368 A.D.); see Y. HSIEH, TANG MING LU HO PIEN (The Combined Compilation of the Tang and Ming Codes) 2a (1922). For a detailed study of legal adjustments in Yuan dynasty; see P. CH'EN, CHINESE LEGAL TRADITION UNDER THE MONGOLS (1979).

18. Sir George Staunton in his introduction to the translation of the Ta Ching Lu Li observed:

By far the most remarkable thing in this code is its great reasonableness, clearness and consistency, the business-like brevity and directness of its provisions, and the plainness and moderation in which they are expressed. There is nothing here of the monstrous verbiage of most other Asiatic productions, none of the superstitious deliberation, and the miserable incoherence, the tremendous *non sequiturs* and eternal repetitions of those oracular performance . . . nothing even of the turgid adulation, accumulated epithets and fatiguing self-praise of other Eastern despotisms . . . but a calm concise and distinct series of enactments, savouring throughout of practical judgment and European good sense, and if not always comfortable to our improved notions of expediency, in general approaching to them more nearly than the codes of other nations . . . for the repression of disorder and the gentle coercion of a vast population, it is equally mild and efficacious.

Cheng, *supra* note 17, at 7. It was also translated into French by Renouard de Sainte-Croix in 1812 and an Italian version was published about the same time. Another edition dated 1890 has been extensively translated into French, with commentaries, notes and appendices by Father Gui Bonlais; see Cheng, *The Development and Reform of Chinese Law*, 1 CURRENT LEGAL PROB. 170, 173 (1948). An excellent analysis of the Code in its own terms has been done by William Jones in *Studying the Ch'ing Code — The Ta Ch'ing Lu li*, 22 AM. J. COMP. L. 330 (1974).

incorporate as many of the moral ideas and concepts of Li into the codes as possible.¹⁹ Aside from the work of codification, officials from the lowest magistrates, who were also the local chief executive, to various higher authorities in the government hierarchy were inclined to dispense justice in Confucian terms, because they were also the successful candidates in the competitive civil service examination. Furthermore, where the law was silent or where there was no provision of law applicable to a particular suit, the judge often turned to Confucian doctrines for guidance. Tung Chung-shu gained prominence in this area by invoking the principles set down in the Chun Chiu, the Confucian classic in which Confucius exalted some of the great ethical principles as cardinal rules for regulating human relations. His work "Chun Chiu Chueh Yu" (Judging Cases by Chun Chiu) included 232 cases, and he was frequently consulted even after his retirement.²⁰ Another Confucianist in Later Han, Ying Shao, wrote a book entitled "Chun Chiu Tuan Yu" on the same subject. Besides these two, there were many others who used the same principles in rendering judgment.²¹

The most important characteristics of traditional Chinese law are to be found in the concept of family and in the system of social hierarchy. In China, the family, not the individual, constitutes the

19. The definition of the word "Li" varies and is difficult to translate. Literally, it may be translated as "ceremonies", "rites", "etiquette", or "a code of behavior". However, this magic word means much more to the Chinese. Indeed, it covers the whole scope of proper human behavior in family, social, economic, and official dealings. According to Needham, a veteran in Chinese history, Li meaning customs of the society based on ethics or on ancient taboos, includes in addition all kinds of ceremonial and sacrificial observances. See II J. NEEDHAM, *SCIENCE AND CIVILIZATION IN CHINA* 519 (1969). In the definition offered by a Chinese student, Leonard Hsü, the essential element in Li is the exercise of reason and judgment. He further breaks Li down into three aspects: first, an ordering of society in which each individual knows his rights and duties so that obedience to the natural order will naturally ensue; second, a code of morality which, being based on human nature, operates not by external control but through individual conscience; third, Li provides an ideal of social harmony, emphasizing the individual's obligation to society; L. SHÜ, *THE POLITICAL PHILOSOPHY OF CONFUCIANISM* 93-99 (1932). Thus, Li embodies an ethical content. As the English language seems incapable of supplying a term which can express the full meaning of Li, it is interesting to note the late Dr. Hu Shih, a prominent modern Chinese philosopher, has translated Li into a German term *Sittlichkeit*, the concept of ethics of Kantian and Hegelian philosophy. See Michael, *The Role of Law in Tradition, Nationalist, and Communist China*, 9 *CHINA Q.* 124, 127 (1962).

20. Ch'ü, *supra* note 8, at 276.

21. *Id.*

unit of the social and the political community and serves as a model by which the state is governed. Just as the highest duties inculcated by the moralists are those owing to parents and elders, so the strictest obligations of the law are attached to these relationships. Such considerations of relationships could have either a mitigating or an aggravating influence in regard to penalties. Although space does not permit the citation of all the interesting examples in which the presence of a certain relationship would increase or decrease the penalty, several of them should give a fair understanding of this characteristic.

A relationship had a mitigating influence whenever the rigor of the law was softened to meet the requirement of justice, that is, the harmony of the universe. It could, for instance, save the life of a convicted murderer whose parent or grandparent was old, or disabled, when he himself was the sole able-bodied member in the family. In this instance, serving his parents and continuing the family were more important than punishing the offender. In addition, those offenders under the age of 15 and above 70, as well as the partially disabled, were entitled to redemption when sentenced to any punishment not greater than banishment. Offenders under the age of 7 or above 90 were not punishable at all, even for crimes worthy of death.²²

A punishment was made more severe when, within a family, the offender was of a junior generation. The most severe punishment doubtless was imposed upon patricide. The Ching Code provided that "any person convicted of a design to kill his or her father or mother, grandfather or grandmother, whether on the father's or mother's side . . . shall . . . suffer decapitation."²³ In contrast to this terrible punishment is that inflicted upon a father who kills a son, which is only 70 blows and banishment for a year and a half. Between these two extremes the punishment varied, depending upon the degree of the relationship between the parties, and upon whether the crime was committed by the older or the younger relative.

Moreover, Confucianism placed a strong emphasis on filial piety, even at the expense of public interest. Thus, we have the following:

The Duke of Sheh informed Confucius, saying "Among us here there are those who may be styled upright in their conduct. If

22. For a more detailed discussion, see Gen, *Some Characteristics of the Ancient Chinese Law*, 48 ASIATIC REV. 156, 159 (1952).

23. § CCLXXIV, in SIR G. STAUNTON, *TA TSING (CHING) LEU (LU) LEE (LI)*, at 305.

their fathers have stolen a sheep, they will bear witness to the fact." Confucius said, "Among us, in our part of the country, those who are upright are different from this. The father conceals the misconduct of the son, and the son conceals the misconduct of the father. Uprightness is to be found in this."²⁴

This can be further illustrated by the fact that only in the gravest matters, such as treason, could a son or daughter denounce a parent to the magistrate. Any attempt by a child to invoke the protection of the state against parental ill-treatment was itself an enormous crime and was punishable by death. In order to protect the solidarity of the family, the law went further in providing allowances for the natural disposition of family members to shield each other from the consequence of a crime except in cases of rebellion or joining the emperor's enemy, where failure to give information, whether between father and son or between brothers, was grounds for heavy punishment.²⁵

24. CONFUCIUS Book XVIII, ch. 18. Another well-known statement by Mencius is also worth quoting in full:

Tao Ying asked Mencius, saying "Shun being emperor, and Kao-yao chief minister of justice, if Ku-son (Shun's father) had murdered a man, what would have been done in the case?" Mencius said, "Kao-yao would simply have apprehended him." "But would not Shun have forbidden such a thing?" "Indeed, how could Shun have forbidden it? Kao-yao had received the law from a proper source." "In that case what would Shun have done?" "Shun would have regarded abandoning the empire as throwing away a worn out sandal. He would privately have taken his father on his back, and retired into concealment, living somewhere along the seacoast. There he would have been all his life, cheerful and happy, forgetting the empire."

See MENCIOUS, Book VII, ch. 35.

25. A typical provision in this respect can be found in § XXXII of the Ta Ching Lu Li in STAUNTON, *supra* note 18, at 34-35, which provided:

All relations connected in the first and second degree and living under the same roof, maternal grand-parents and their grandchildren, fathers and mothers-in-law, sons and daughters-in-law, grandchildren's wives, when mutually assisting each other, and concealing the offences, one of another, and moreover, slaves and hired servants assisting their masters and concealing their offences, shall not, in any such cases, be punishable for so doing.

In like manner, though they should inform their relations of the measures adopted for their apprehension, and enable them to conceal themselves, and finally to effect their escape, they shall still be held innocent.

When relations in the third and fourth degrees assist and protect each other from punishment in the manner here described, they shall for such conduct be liable to punishment, but only in a proportion of three degrees less than would have been inflicted on strangers under the same circumstances.

The same offences committed by relations in still more remote degrees of kindred, shall be punished with one degree less of the extent of the punishment inflicted in

The same purpose appears in the enactment regarding larceny. Every member of the family was regarded as having a qualified interest in the property of each other, the interest being greater the nearer the kinship. The law therefore provided that "all persons found guilty of stealing from a relation by blood or by marriage, in the first degree, shall suffer a punishment five degrees less severe than that which is legally inflicted in ordinary cases of theft in the same amount. In like manner all persons found guilty of stealing from relations in the second degree shall suffer punishment four degrees less severe than that ordinarily inflicted; from relations in the third degree, three degrees less severe."²⁶

The correlative of the provisions just quoted was a system of joint responsibility, in which members of the family were made mutually responsible for each other's conduct. As the scope of implication might be extended through generations, the severity of this principle was unprecedented. It was even said that the members of the offenders' concubines' families were involved and sentenced to death.²⁷ Fortunately, this law was limited to offences involving the state and the public; injuries to persons or to the property of an individual were not included.

Another inequality within relationships in the family was the inferior status shared by women. For example, the Ta Ching Lu Li provided that:

If a principal or first wife is guilty of striking her husband, she shall be liable to the punishment of 100 blows; and the husband, if he desires thereof, may obtain a divorce by making application for the same to the magistrate of the district. If any such wife strikes for as to wound her husband, she shall be punished by three degrees more severely than in the case of striking in the same manner an equal in ordinary cases.²⁸

ordinary cases. . . . Nevertheless, none of provisions of this law in mitigation or remission of the punishment of harbouring, concealing, and assisting relations, shall be pleaded, or have any effect, in cases of high treason or rebellion.

26. § CCLXXII, *see id.*, at 287.

27. Such was the case of Shun-yu Chang, whose six concubines had been remarried after he was arrested and before he was sentenced to death, but whose concubines' families were eventually sentenced to death regardless of some officials' protest against it; *see* Cheng, *The Chinese Theory of Criminal Law*, 39 J. CRIM. L. 461, 467 (1948).

28. § CCCXV, in STAUNTON, *supra* note 18, at 341.

On the other hand, it was no crime for a husband to strike his wife.²⁹ Nevertheless, Chinese women were less liable to prosecution and punishment. Except for adultery and crimes worthy of death, there was no imprisonment for women. In addition, women were entitled to send their sons, younger brothers or nephews as their representatives to the court, and they sometimes could even thus be punished.

Beyond the family, different social status also significantly determined the amount of punishment, particularly in cases involving special privileged groups which includes those who qualified under the "eight conditions for consideration." These were (1) imperial clansmen, relatives of the emperor or empress, (2) old faithful officials of the government who saw the emperor often, (3) those who had rendered service to the government on the battlefield, (4) great learned scholars, (5) the very able employees of the government, civil or military, (6) the diligent and dutiful employees of the government, (7) any official, either civil or military of at least the third rank, and (8) guests of the state. The most significant privilege granted to these groups was that they could not be investigated, arrested, or tortured without the permission of the emperor; the sentences of those found guilty of an offense were subjected to consideration and approval by the emperor with a view to possible reduction. Even after a sentence was imposed, it was still possible for officials to avoid actual punishment. For example, the giving up of an official post would cancel out a punishment of three years imprisonment.³⁰

During litigation in court the official was further granted the legal privilege of declining to appear before the court with the opposing party, if the latter was a commoner. However, since officials were required by Confucian morality to set a moral example to those beneath them, for certain offenses they were exposed to heavier punishments than those prescribed for the ordinary man. An official who debauched a woman living within his jurisdiction would receive a punishment two degrees greater than the normal punishment for his offense.³¹

29. "A husband shall not be punished for striking his first wife, unless the blow produces a cutting wound; in which cases, complaint having been made by the wife to a magistrate, punishment shall be awarded two degrees less than in ordinary cases between equals." *Id.* at 342.

30. CH'Ü, *supra* note 8, at 181.

31. D. BODDE & C. MORRIS, *supra* note 9, at 35. For a more detailed account of this special Chinese system, see CH'Ü, *id.* at 177-84.

C. Administration of Justice

The code was implemented and enforced primarily by the county (hsien) magistrate, who was the emperor's all-purpose surrogate in dealing with the people at large. Since all cases, civil as well as criminal, were to be decided by him in the first instance,³² and since he was also required to conduct investigations and to detect crimes in addition to hearing cases and rendering decisions, he could exercise awesome punitive powers. In short, he acted as detective, prosecutor, coroner, judge, and jury.

As the judicial system was not separated from the executive branch of government in traditional China, the magistrates had to perform a variety of administrative functions in addition to the administration of justice. Those included tax collection, maintenance of social order, education, social welfare, granaries, and supervision of local public work. Hence, magistrates were not primarily legal officers, but administrative officers of the government. Besides, they were among the lucky ones who had passed the civil service examination, with its emphasis on the Confucian classics; consequently they lacked the necessary legal knowledge and training, as Li was put above Fa, which amounts to law, during their education process. Under the circumstances, they had to rely exclusively upon their clerks and secretaries for the administration of justice. Those secretaries of law were extremely skillful in sifting and weighing evidence and in applying the law to the case in hand. Their work included endorsing or rejecting a complaint, arranging dates of hearings, providing legal advice, and writing legal reports on serious cases to the superior officials who supervised the district.³³ However, they were unable to attend trials, and this no doubt constituted an obstacle to the efficient handling of legal cases.³⁴

32. There was no time limitation on criminal cases; they could be reported to a magistrate at any time. The acceptance of civil complaints, however, had been restricted to only six or nine days of each month except during the "busy season for farmers," that is, from the first day of the fourth month to the thirtieth day of the seventh month; see T. CH'Ü, *LOCAL GOVERNMENT IN CHINA UNDER THE CH'ING* 118 (1962).

33. For an account of their work, see *id.*, at 98-101.

34. This is because those legal secretaries were not part of the formal administrative system; their salaries came from the private purse of the magistrate and they were the latter's personal employees. Another interesting point is that since there was no formal legal education, a legal secretary always had some pupils with him. In the course of time these were recommended for employment to magistrates in want of secretaries. As a result, they were usually from the Chekiang province, and, further, from the Shaoshingfu (Shaoshing County).

Several characteristics about the manner of conducting trials in traditional China must be mentioned here. First, the employment of torture to obtain confession was a necessary part of the penal system, particularly since a magistrate was not permitted to pass sentence unless the prisoner confessed guilt.³⁵ Accordingly, unless the case was to be abandoned, the accused had to be confined and tortured until he or she broke down and made a clean breast of things by telling all of his or her misdeeds and by giving the names of all who were associated with him or her. Needless to say, the innocent were not protected by this system. The modes of torture were numerous and very severe. Still, according to the Penal Code of the Tang dynasty, torture could not be employed except in a case where there was sufficient and plain evidence against the offender; it was confined to beating with the stick, and limited to no more than three occasions, totaling no more than 200 blows altogether.³⁶ In addition, all instruments of torture had to accord with standard sizes and forms. They had to be examined and branded by the superior administrative agency. Some privileged groups such as persons entitled to the "eight considerations," the aged, juveniles and the disabled, were also exempted from torture.

Second, the concept of justice in traditional China was very different from the popular ideas of court proceedings in Western lands. Instead of assuming innocence as a basis, the defendant was presumed to be guilty.³⁷ Not only did the magistrate himself have to conduct the examination, questioning and cross-examining the defendant in order to extract the truth, but also no lawyer was in court to consult and assist the defendant. As a result of the elevation of the Confucianist concept of Li over the Legalist emphasis of Fa, it is understandable that the attitude of the people toward the practice of law as an honorable profession had never been encouraged. In fact, those who provided legal advice, which could only be provided secretly, were generally men of bad reputation. The Ta Ching Lu Li expressly provided that those who incited others to undertake litigation or made profit out of managing a lawsuit would be penalized.³⁸ This restriction severely impeded the technical development of law in China.

35. This system was said to have originated in the notorious Chin dynasty where Legalism dominated the then-prevailing political ideology.

36. Gen, *Some characteristics of the Ancient Chinese Law — II*, 48 ASIATIC REV., 233, 239 (1952).

37. *Contra*, Buxbaum, *supra* note 15, at 269-70.

38. See S. SPRENKEL, *LEGAL INSTITUTIONS IN MANCHU CHINA* 66, 69 (1962).

Third, the most peculiar aspect of the traditional legal system was the comprehensiveness of its appeal system, which automatically took all but a few cases to higher levels of litigation for final judgment. To be more specific, the magistrate was only authorized to pronounce sentence in civil and minor criminal cases where punishment was no more severe than beating or imposing the cangue. Even so, he had to make monthly reports to his superior on the details of cases. For those serious cases that called for penal servitude, the magistrate had to report to the superior officer, who might approve the former's recommended sentences. Cases involving a sentence of exile, banishment, or penal servitude as a penalty for homicide were retried by the superior officers and were reported to another higher agency. Most importantly, all capital offences were sentenced by the emperor himself, after discussion with a committee of leading mandarins from several governmental bodies, including the Board of Punishment. This Board was one of the six regular departments of the government.³⁹ Thus, a case, without any action of either party, might undergo a certain number of retrials to reach final judgment by the authorized superior, whose level was specified according to the grade of punishment.⁴⁰

On the other hand, a person was generally free to take an appeal to the superior if he was dissatisfied with the judgment of the lower courts. Such an appeal was nothing more than a petition asking for the superior's supervision of his inferior.

D. Preference for Mediation

We should bear in mind that the maintenance of social order and the settlement of troubles in the social life of traditional Chinese society did not wholly or even in the main depend upon the governmental administration of justice. A kind of justice administered in an informal manner by autonomous organizations of the people, such as family, clans, villages, guilds, etc., was, in fact, far more effectively and extensively employed by the people. As mentioned above, according to the dominant Confucianist ideology, law was considered useful only when it served as an instrument for the

39. Hudson even concluded, "What seems to have struck the sixteenth century observers as most remarkable in the operation of the Chinese law was the system of reviewing cases in which a death sentence had been pronounced." G. HUDSON, *EUROPE AND CHINA* 241 (1931).

40. For a fairly detailed account of this system, see CH'Ü, *supra* note 32, at 116-18; SPRENKEL, *supra* note 38, at 67-68.

legislation of morality. Its existence was but a necessary evil. Because law had never been freed from its dependence on morality, Chinese traditional values emphasized not the rights which are an inevitable development of the laws themselves, but the duties of the individual. Once individuals were familiar with their rights, they were inclined to assert them and thus caused disputes. The very existence of a trial was a scandalous disturbance of the natural order which might lead to a further disturbance of the social order to the detriment of all society. Any sort of trial was thus condemned, because it was a sign of troubled relationships between individuals. The mere act of appealing to a magistrate, even when the appeal was justified, was enough to have a man branded a troublemaker. Therefore, some middle road had to be sought which took into consideration the interests of both parties when interests conflicted.

In other words, it was better for those who felt they had been wronged to "suffer a little and smooth the matter over rather than make a fuss over it and create further dissension."⁴¹ Specifically, if one stood in the right, it was recommended that he "be merciful to the offending party and set an example of the kind of cooperation that fostered group solidarity rather than exact one's pound of flesh and further alienate the offender from the group."⁴² This philosophy is in marked contrast to the western legal procedure which tends to depersonalize claims in order to bring out more sharply the question at issue. The Chinese system, on the other hand, tries to personalize all claims, seeing them in the context of human relationships.

Under the circumstances, it is not surprising to find that there were many social groups (families, clans, villages, guilds and associations) available to intervene and act as arbitrators or mediators.⁴³ For difficulties within the family the head of the family acted as a conciliator or mediator; sometimes, more remote relatives or even outsiders who were highly respected were sought. The standards applied by these mediators seeking compromise came from

41. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CALIF. L. REV. 1201, 1207 (1966).

42. *Id.*; as John Wigmore has written: "The 'struggle for rights,' which the great German jurist, von Ihering, inculcated as the basis of civil law and order, is alien to Chinese thought. An unyielding insistence upon principle, and a rigid demand for one's due, are almost as reprehensible as a vulgar physical struggle." See J. WIGMORE, *A PANORAMA OF THE WORLD'S LEGAL SYSTEM* 141, 150 (1936); see also SPRENKEL, *supra* note 38, at 114-15.

43. The preference for settlement of disputes in a private, rather than public institution, of course, contributed to the scanty development of the civil law.

the rules of behavior or the Li, the practices of their area, and from the mediators' own experience and knowledge of the world. The prestige of the mediator was often sufficient to bring considerable social and moral pressure upon the parties and to succeed finally in obtaining an agreement. Similar procedures applied where the parties were not related to each other but belonged to the same clans, lived in the same villages, or were members of the same guild; here the elders of the clan, seniors of the guild or other persons of the local elite were invited to act as mediators.⁴⁴ The parties in these civil and minor criminal cases⁴⁵ could take their cases to the official courts, but it was normal for them to try mediation first. As a matter of fact they had to try mediation if they were to avoid social censure. In most cases the members of the clans and guilds were specifically prohibited by each group's internal regulations from seeking official help directly.⁴⁶ Therefore, even though Tokugawa Japan (1603-1868), which expressly provided that civil cases must be mediated first before resorting to the courts,⁴⁷ literally differed from the traditional Chinese legislation, which did not require extrajudicial mediation as a compulsory first step in the process of resolution of disputes, in the actual context of Chinese life there was not much difference between China and Japan.

The most crucial problem generated by extrajudicial mediation was that since both parties were automatically under pressure to put an end to a dispute, the agreement finally reached was often not a real settlement. "The disagreement was merely driven below the surface and went on simmering, and the situation was ripe for explosion or provocation."⁴⁸ Although it occurs in formal judicial procedures, perhaps even in most civilized countries, that wealthy, powerful individuals or families have preponderant advantages in

44. For a more detailed description of mediation, see C. CHANG, *THE CHINESE GENTRY* 63 (1955); H. HU, *THE COMMON DESCENT GROUP IN CHINA AND ITS FUNCTIONS* 17 (1948); M. YANG, *A CHINESE VILLAGE* 165 (1945); SPRENKEL, *supra* note 38, at 116; Cohn, *supra* note 41, at 1215-22; Lubman, *Mao and Mediation: Politics and Disputes Resolution in Communist China*, 55 CALIF. L. REV. 1284-1300 (1967).

45. For those cases involving serious violence such as arson, kidnapping and the like, mediation was less frequent because the local leaders often took seriously their duty to report to the magistrate; see K. HSIAO, *RURAL CHINA* 292 (1960).

46. On the clans, see H. LIU, *THE TRADITIONAL CHINESE CLAN RULES* 156-58 (1959); on the guilds, see SPRENKEL, *supra* note 38, at 89-96.

47. D. HENDERSON, *CONCILIATION AND JAPANESE LAW, TOKUGAWA AND MODERN* 128-29 (1965).

48. SPRENKEL, *supra* note 38, at 119-20.

settling disputes, this was more obvious in the local mediation process. Furthermore, it was possible for mediators to stir up disputes in order to profit from mediation. In addition, for those who were not satisfied with the results of mediation and who felt they had a legitimate right but were turned down by extrajudicial institutions, the possibility of challenging mediation in court was rather slim. Not only was the magistrate often ready to accept the view of those local institutions, but those seeking to challenge the results of mediation would be ruthlessly castigated by the public.

On the other hand, the advantages of mediation were numerous. Most of all, it avoided the time and expense of formal legal suits. Private problems did not have to be revealed in public. Since the parties, both defendant and plaintiff, were often incarcerated and might have further suffered prescribed torture pending the trial, there is no doubt that the mediation process was literally a more comfortable one. The persons who presided over the mediation were generally most familiar with the facts of the case, and inhabitants would usually be more receptive to decisions by others from their locality. There were also practical considerations. In a country as large as China where transportation was badly in need of improvement, the time and expense for parties traveling to the court seat and staying there constituted an almost insurmountable problem for those who did not live nearby. Extrajudicial institutions also relieved the burden of the government so that it might thus devote more time and energy to other, more important works. In the seventeenth century one of the Chinese rulers, the Emperor Kang Hsi, went so far as to declare:

lawsuits would tend to increase to a frightful amount, if people were not afraid of the tribunals, and if they felt confident of always finding in them ready and perfect justice. As man is apt to delude himself concerning his own interests, contests would then be interminable, and the half of the Empire would not suffice to settle the lawsuits of the other half. I desire therefore that those who have recourse to the tribunals should be treated without any pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate.⁴⁹

49. *Id.*, at 77.

Accordingly, it was not unusual for the magistrate to order would-be litigants to return to their villages to have the matter settled first by local mediation.⁵⁰

E. Legal Reform in the Mainland

Despite its great tradition, Chinese law gradually displayed its weakness in the 19th century after dealing with western countries. As most civil matters were regulated by ethical custom rather than formal law, the scarcity of civil provisions and a near absence of commercial law in the traditional codes made Chinese law incompatible with the needs of a modern society. The highly developed doctrine of responsibility, which held relatives, neighbors, superiors, or even all the members of a particular nationality liable for an offence committed by an individual wrongdoer who had fled was a system which foreigners found simply unacceptable. In addition, the frequent use of the death penalty and of judicial torture, not only upon the accused, but also upon witnesses, was also found to be repugnant. Foreigners alleged that the gradations of punishment, including decapitation and mutilation of an offender,⁵¹ were too severe.

This unsympathetic attitude toward Chinese jurisprudence, however, emerged only after the European countries had undergone a social and political revolution in the eighteenth century which made their criminal codes less severe and more humane in the administration of justice than those of the Celestial Empire. Before that, the dispensation of justice under the Chinese system compared favorably with other systems in its methods and results, as did many other features of Chinese institutional and cultural life.⁵² William Blake Odgers once described the severity of English law as follows:

In the year 1820 there were more than two hundred crimes punishable with death, of these more than two thirds had

50. CH'Ü, *supra* note 32, at 175, n.51.

51. For a fuller discussion, see 1 G. KEETON, *EXTRA-TERRITORIALITY IN CHINA* 96-136 (1928).

52. As early as 850 A.D. an Arab traveler said that the Chinese "administer justice with great strictness in all their tribunals"; see WIGMORE, *supra* note 42, at 154-55. Despite the fact that he was held captive in China, Galeotti Pereyra emphatically asserted that justice is done in China and held it to be one of the best governed countries in the world; Peake, *Recent Studies on Chinese Law*, 52 *POL. SCI. Q.* 117, 119 (1937).

been made capital during the eighteenth century. Sir Samuel Rominly asserted that there was no other country in the world where so many and so large a variety of actions were punishable by loss of life. Nearly all felonies were capital. If a man falsely pretended to be a Greenwich Pension he was hanged. If he injured a county bridge or cut down a young tree, he was hanged. . . . If he stole property valued at five shillings . . . he was hanged. . . . And these barbarous laws were relentlessly carried into execution. A boy only ten years old was sentenced to death in 1816.⁵³

One is thus justified in concluding: "In the beginning of Western intercourse with China, Chinese codes were less severe than those of Europe."⁵⁴

Realizing its inability to resist the advancement of western powers, China was forced to grant extraterritorial rights, the excuse being that Chinese law and its legal system were primitive. The earliest grant of such rights by China was contained in the supplemental treaty of July 1843 with Great Britain.⁵⁵ At first, the exercise of extraterritorial rights by the Western powers in China might not have been regarded by the Chinese as abhorrent. Because her tradition was to avoid any contact with foreigners, granting extraterritorial rights was the corollary of her acquiescence in the settlement of disputes among foreigners.⁵⁶ Some western scholars

53. W. ODGERS, A COUNTRY OF LAW REFORM: CHANGES IN THE COMMON LAW AND THE LAW OF PERSONS IN LEGAL PROFESSION AND IN LEGAL EDUCATION 7 (1901).

54. Wing Mah, *Foreign Jurisdiction in China*, 18 AM. J. INT'L L. 676 (1924), quoting E.T. Williams; see also E. PARKER, CHINA: HER HISTORY, DIPLOMACY AND COMMERCE 308 (1917); V. KOO, THE STATUS OF ALIENS IN CHINA 77-94 (1912).

55. Article XIII of the General Regulations for British Trade at the Ports of Canton, Amoy, Foochowfoo, Ningpo, and Shanghai. Other powers which had extraterritorial treaties with China were the United States, France, Norway and Sweden, Germany, Russia, Denmark, the Netherlands, Spain, Belgium, Italy, Austria-Hungary, Brazil, Peru, Portugal, Japan, Mexico, and Switzerland. The provisions of these treaties were collected in 1 G. HERTSLET, HERTSLET'S CHINA TREATIES (1908).

56. Keeton, *The New Chinese Codes*, 8 J. COMP. LEG. 3d ser. 225 (1926). S. Williams gave a famous quotation as follows: "The barbarians are like beasts, and not to be ruled on the same principle as citizens. . . . To rule barbarians by misrule is the true and best way of ruling them." However, we must bear in mind that before the Reformation the Europeans' conceptions of their power over those who visited their shores were not unlike those which prevailed in China; see II S. WILLIAMS, THE MIDDLE KINGDON 450 (1904).

even cited the grant of an exemption from the local Chinese laws to the Arabians at Canfu in the ninth century as well as to the Portuguese at Macao in later centuries⁵⁷ and a series of treaties entered into with Russia relating to territorial jurisdiction⁵⁸ as precedents to the Chinese recognition of the principle of extraterritoriality.⁵⁹

However, one thing was certain: all cases in which a Chinese appeared either as plaintiff or as defendant were within the justifiable reach of a Chinese court,⁶⁰ and thus the criminal procedure of traditional China constituted the principle controversy between the Chinese and foreigners. The solution to the difficulty was the imposition of extraterritoriality. Since this decision resulted from a Chinese military defeat, the Chinese gradually realized that extraterritoriality diminished their sovereignty and was inconsistent with the legal principle of the equality of states. It is by no means the case, however, that the argument against extraterritoriality was mainly one of sentiment. Rather, it was a careful, well-supported statement which cited numerous practical defects and abuses. These can be illustrated by an observation made by C. Bishop, a former American assessor of the Mixed Court at Shanghai.⁶¹

57. T. JERNIGAN, *CHINA IN LAW AND COMMERCE* 194 (1905).

58. Article 4 of the Treaty of Nipchu or Nerchinsk 1689 provides: "If hereafter any of the subjects of either nation pass the frontier and commit crimes of violence against property or life, they are at once to be arrested and sent to the frontier of their country and handed over to the chief local authority for punishment." The Treaty of the Frontier, signed at Kiakhta in 1729, and the Supplementary Treaty of Kiakhta signed in 1768 contained similar provisions relative to the suppression of brigandage and other disturbances along the coterminous frontiers. For texts, see *THE STATISTICAL DEPT of INSPECTORATE GENERAL OF CUSTOMS, 1 TREATIES, CONVENTIONS, ETC., CHINA AND FOREIGN STATES* 3, 18 (1908).

59. Chinese scholars refuted this by saying that "the Arabian practice seems to have been forgotten and fallen into disuse long before the formal introduction of extraterritoriality into China. . . . It was a mere unilateral grant and could have been revoked at the pleasure of the grantor. As a matter of fact, no claim to special jurisdiction appears to have been entertained by any power on the basis of this early grant." S. LIU, *EXTRATERRITORIALITY: ITS RISE AND ITS DECLINE* 80 (1925). As for these Russian treaties, as Dr. Koo also pointed out, "far from establishing the principle of extraterritoriality, they seem to have involved nothing more than an application, in exceptional circumstances, of the principle of personal law, which is found in the criminal jurisprudence of substantially all civilized nations to a greater or lesser extent." see KOO, *supra* note 54, at 53.

60. 1 H. MORSE, *INTERNATIONAL RELATIONS OF THE CHINESE EMPIRE* 64 (1910).

61. For the case of the United States, see Bishop, *American Extraterritorial Jurisdiction in China*, 20 *AM. J. INT'L L.* 281-99 (1926); Loring, *American Extraterritoriality in China*, 10 *MINN. L. REV.* 407-16 (1926).

The strongest plea for the abolition of extraterritoriality lies in the abuse of this privilege on the part of subjects of foreign powers who use it as a cloak for illegal acts. The continued smuggling of opium and morphine into China is but a single example, although the most striking, of the wrong that is being done to China under the cloak of a foreign extraterritorial jurisdiction.⁶²

In a number of instances foreign courts imposed comparatively light sentences upon criminals.⁶³ Also, the Chinese litigants were placed at a disadvantage because the variety of foreign laws and legal arrangements were confusing and conducive to distrust. These were merely the most obvious difficulties involved in extraterritoriality.⁶⁴

Since extraterritorial rights grew out of a dissatisfaction with Chinese law, it was widely believed that modernization of the law would assist China in overcoming her weakness and would eliminate the demand for extraterritoriality. This attitude gained added impetus from the Japanese legal reform and the resulting successful abolition of extraterritoriality before the close of the century. Moreover, Great Britain, the United States, Japan, Sweden, and Switzerland had promised in their respective treaties with China to abolish extraterritoriality as soon as the state of Chinese law permitted it.⁶⁵ The result was the establishment of the Imperial Law

62. Bishop, *Extraterritoriality in China and its Abolition*, 5 CHINESE SOC. & POL. SCI. REV. 3: 175 (1920).

63. *Id.*

64. On the defects of extraterritoriality in China, the references are plentiful; see W. WILLOUGHBY, FOREIGN RIGHTS AND INTERESTS 67-87 (1927); Tyau, *Extraterritoriality in China and the Question of its Abolition*, BRIT. Y.B. INT'L L. 133-49 (1921-23); Price, *Extraterritoriality in China*, 11 OREG. L. REV. 264, 278-81 (1932).

65. In Article XII of the revised Commercial Treaty in 1902, Great Britain made the following promise:

China having expressed a strong desire to reform her judicial system and to bring it into accord with that of Western nations . . . Great Britain agrees to give every assistance to such reform, and she will also be prepared to relinquish her extraterritorial rights when she is satisfied that the state of the Chinese laws, the arrangement for their administration and other consideration, warrant her in so doing.

A similar provision also appeared in the Commercial Treaties concluded a year later with the United States, Japan, and Sweden in 1908, and Switzerland in 1918; for texts, see TREATIES AND AGREEMENTS 351, 414, 431, 745, 1430 (J. MacMurray ed. 1921).

Codification Commission in 1904, which included Dr. Wu Ting-fang, a member of the English Bar and a former Minister to the United States, and Shan Chia-pan, an eminent jurist in Chinese jurisprudence. Japanese advisor Mutsuoka Yoshitada was associated with the Commission,⁶⁶ and it is not surprising to find that a number of draft codes of procedure and of criminal and civil law were considerably influenced by the Japanese code, which in turn was based upon Continental Codes, primarily the German and the French.

There was considerable wisdom in the appointment of Japanese experts since Japan had recently solved the difficult problem of adapting western legal principles to eastern requirements. Moreover, there also was plausible reason for the reproduction in the Chinese code of the chief characteristics of continental rather than Anglo-American law. It is said that "Anglo-American law emphasizes the individual at the expense of the family, while continental law inherits something of the old 'familia.' The family being the unit of Chinese society, anything which weakens the existence and power of that institution must be as unacceptable in principle as it would be unworkable in practice."⁶⁷ The more important consideration was that Anglo-American law existed not only in statutes but also in judicial as well as administrative decisions which were too complex and too little systematized at that time. To a country which had to borrow foreign codes, a ready-made code of comprehensive rules clearly and concisely set forth article by article was not only simpler and more systematic, but a more promising method of obtaining satisfactory results. As one eminent Chinese jurist once said to G. Keeton, a keen English observer of extraterritoriality in China, "We like your law and for some reasons we would have preferred them as a model for our own, but we cannot codify your own laws for you."⁶⁸

The first modern code ever drafted by the Codification Commission was the KUNG-SSU-LU (Company Law) of 1904. The Code was a hybrid of Japanese and English company laws in an abridged form.⁶⁹ The Anglo-American influence was, however, limited to that particular field. In addition to this, a number of codes on civil law, maritime law, bankruptcy law, criminal law, and civil and criminal

66. Information provided in J. ESCARRA, *LE DROIT CHINOIS* 154 (1936).

67. Wang, *Revision of the Chinese Criminal Code*, 13 *ILL. L. REV.* 219 233 (1918).

68. Keeton, *The Progress of Law Reform in China-II*, 20 *J. COMP. LEG.* 3d ser. 210, 220 (1938). As the codification in Anglo-American law has been sped up recently, its influence on Chinese law is more obvious than ever. We will deal with this later.

69. For a full discussion of this law, see Li, *The Kung-ssu-lu of 1904 and Modernization of Chinese Company Law*, 10, *CHENGCHI L. REV.* 171 and 11 *ibid* 163 (1974).

procedure were also drafted.⁷⁰ Of those early efforts, however, only the "Provisional Regulations of the Organization of the Courts and Subordinate Courts" (1907), the "Law of the Organization of the Judiciary" (1909), and the Criminal Code ever came into operation; the rest remained only on paper, because they were generally the result of hasty drafting and because the sponsoring Ching government fell within a few years. According to these organic laws, a hierarchy of modern courts of four classes — the Local Court, the District Court, the High Court and the Supreme Court — was created. Subsequently, the Local Court was abolished. Since then the District Court has become the court of first instance, where the trial is conducted by one judge. An appeal may be made to a High Court where three judges sit, and the last appeal is usually heard by five judges without oral argument and is limited to questions of law in the Supreme Court.⁷¹

To every modern court, a procurator of corresponding grade is attached. The Chinese procurator has no exact equivalent in American legal terminology. His authority is quite extensive and powerful. He is the combination of prosecutor, coroner, or grand jury under American system; that is, he has the power to hold a preliminary examination of the accused and the witness so as to decide whether the case should be prosecuted or not. In exercising this power he may summon, arrest, and detain the accused without first getting approval from a judge; he may also compel a witness to appear and make such searches and investigation as may serve to throw light on the case.⁷² This structure of the modern courts continues to function today even though related laws have been revised several times.

The drafted Criminal Code was promulgated by an imperial edict at the end of the Ching dynasty. The republican government, by a presidential mandate of March 3, 1912, adopted the said Code, with the exception of those provisions pertaining to the royal family of the late regime. Several revisions were made in 1914, 1921, and 1928 to bring it in line with most recent developments in criminal jurispru-

70. Laws relating to commercial matters were probably the first to be drafted because China had a large number of foreigners residing in her territory through treaty relations. It was therefore necessary that the scanty provisions of the then civil law, particularly in matters of commerce, were far too inadequate to cope with the many legal problems incidental to the modern age.

71. According to the current Code of Civil and Criminal Procedure (art. 474 and 389, respectively), when it is deemed necessary oral argument may be conducted.

72. See Pound, *Progress of the Law in China*, 23 WASH. L. REV. 345, 357 (1948).

dence.⁷³ This code provided, for the first time, that no person could be held guilty of an offense unless it was expressly provided for. It also ended the principle of collective responsibility of the family and clan for the crimes of members, and torture was abolished. These revised codes were again drafted by the Codification Commission now with different members after the establishment of the Republic. Dr. Wang Chung-hui, a graduate of Yale and a deputy-judge of the Permanent Court of International Justice as well as the famous translator of the German Civil Code into English, was among them. In addition, Tung Kang, the Chief Justice of the Chinese Supreme Court, later Minister of Justice and the last living authority on ancient Chinese law, and Lo Wen-kan, an Oxford M.A. and procurator-general of the Republic, were also members. In addition to two Japanese advisors, Itakura Matsutaro and Iwata Shin, the Frenchman M. G. Padoux was also associated with the Commission. The latter had been responsible for the modernization of the Siamese codes which led to the eventual abolition of extraterritoriality in that country.

The work of this Commission was quite impressive. It published the following volumes within ten years: The Regulations Relating to Criminal Procedure, The Ordinance of the General Regulation of Traders, The Trade Mark Law, The Regulations Relating to Civil Procedure, The Chinese Supreme Court Decisions, Chinese Prisons, and many others. Nevertheless, the external political turmoil which had resulted from the incessant civil wars among warlords and the continued interference by the military seriously impeded the progress of legal reform, particularly in the area of the administration of justice. In other words, the whole system of Chinese law at the time, satisfactory in theory, was inefficient and arbitrary in practice. Therefore, it is natural that the report of the Commission sent to China by the resolution of the Washington Conference of 1922 to inquire into the present practice of extraterritoriality in China, and

73. The Provisional Code had been prepared with the Hungarian Criminal Code of 1878, the German Criminal Code of 1871, the Dutch Criminal Code of 1881, the Italian Criminal Code of 1889, the Austrian Draft Criminal Code of 1893, the Swiss Draft Criminal Code of 1903, the Egyptian Criminal Code of 1904, the Siamese Criminal Code of 1908, and the Japanese Criminal Code of 1907 as guides. The so-called Revised Draft of 1928 was prepared with the Austrian Draft Criminal Code of 1903, the Resolutions of the German Commission of 1914 on Criminal Law Reforms, and the counter-draft submitted by certain German criminologists in 1911 as additional guides; see Chang, *supra* note 18, at 185.

into the laws and judicial system and the methods of judicial administration of China,⁷⁴ was a disappointment to the Chinese.⁷⁵

Although the existing system of extraterritoriality was still desirable according to the survey of Chinese law made by the Commission, this disheartening fact did not discourage the continuance of the law reform movement.⁷⁶ Between the establishment of the National Government in 1928 and the outbreak of the war of resistance against Japan in 1937, the work on codification came to fruition and constituted the most significant domestic achievement by the National Government. The Commission of Codification of Law was transformed into a legislative commission headed by Sun Fo, son of Dr. Sun Yat-sen and the President of the Legislature. The Commission produced the Criminal Code (1935), the Code of Civil Procedure (1935), the Code of Criminal Procedure (1935), the Civil Code (1929), the Law of Insurance (1929), Company Law (1929), Maritime Law (1929), Bankruptcy Law (1935), the Negotiable Instruments Law (1929), and the Trademark Law (1936).

Without exception, the Criminal Code was largely a product of various foreign codes.⁷⁷ One particular feature may be illustrated. This code was based on the equality of men. No privileged group was entitled to exemption or mitigation as the traditional codes provided. Even today, however, family relations still play a part in the determination of punishments. In offenses such as profaning the

74. The full text of the resolution can be found in II KEETON, *supra* note 51, at 5-6.

75. For a detailed analysis of the Report, see *id.*, at 8--75.

76. It should be mentioned that when Germany and Austria lost their extraterritorial rights after World War I and when Russia voluntarily relinquished them in 1924, the reaction of those governments to their nationals treated in the Chinese courts afterwards was generally favorable; see Quigley, *Extraterritoriality in China*, 20 AM. J. INT'L L. 46, 64-65 (1926).

77. These cases included the German Draft Code of 1925 and 1927, the Cuban Draft Code of 1927, the Spanish Criminal Code of 1928, the French Draft Code of 1932, the Italian Criminal Code of 1930, the Japanese Draft Code of 1930 and 1931, the Philippine Criminal Code of 1930, the Polish Criminal Code of 1932, the Siamese Criminal Code of 1908 and the Draft Revised Code of 1919, the Swiss Draft Code of 1931, and the Criminal Codes of the cantons of Fribourg (1924) and Vand (1931), the Czechoslovakian Draft Code of 1926, the Turkish Criminal Code of 1926, the Soviet Criminal Code of 1926, the Proceedings of the International Congress on Criminal Law, of 1926, 1929, and 1933, and the Proceedings of the International Conferences for the Unification of Criminal Law of 1927, 1928, 1930, and 1931; see Keeton, *The Progress of Law Reform in China*, 19 J. COMP. LEG. 3d ser. 197, 203-4 (1937).

dead,⁷⁸ homicide,⁷⁹ causing bodily harm,⁸⁰ restraining personal liberty,⁸¹ and abandonment,⁸² the existence of a family relation between the offender and the victim increases the punishment. On the other hand, in offenses such as theft,⁸³ fraud,⁸⁴ and receiving stolen property,⁸⁵ the presence of a family relationship either requires the judge to remit the sentence or to limit the sentence or limit judicial cognizance to cases where the injured party himself starts a private prosecution.

As civil matters were largely regulated by custom in traditional China, the codification of civil law was not as aggressive as criminal law.⁸⁶ The Civil Code of 1929 also affirmed the principle of the

78. Article 250 provides: "A person who commits an offence specified in one of the Articles 247 through 249 [offences against graves and corpses] against his lineal blood ascendant shall be subject to the punishment prescribed for such offence increased up to one half."

79. Article 272 provides: "A person who kills his lineal blood ascendant shall be punished with death or imprisonment for life [it is possible to receive a sentence for less than ten years if there is no blood relationship involved]."

80. Article 280 provides: "A person who commits an offence specified in one of the Articles 277 or 278 [offences of causing bodily harm] against his lineal blood ascendant shall be subject to the punishment prescribed for such offence increased up to one half."

81. Article 303 provides: "A person who commits an offence specified in one of the paragraphs I or II of the preceding article [offence against personal liberty] against his lineal blood ascendant shall be subject to the punishment prescribed for such offence increased up to one half."

82. Article 295 provides: "A person who commits an offence specified in the preceding article [offences of abandonment] against his lineal blood ascendant shall be subject to the punishment prescribed for such offence increased up to one half."

83. Article 324 provides: "If an offence specified in this Chapter [offences of larceny] is committed along lineal blood relatives, between spouses, or among other relatives who live together and share their property, the punishment may be remitted."

84. Article 343 provides: "The provisions of Article . . . 324 shall apply *mutatis mutandis* to offences specified in the four preceding articles [offence of fraud]."

85. Article 351 provides: "If an offence specified in this Chapter [offence of receiving stolen property] is committed among lineal blood relatives, between spouses, or among other relatives who live together and share their property, the punishment may be remitted."

86. The reason for their delay is, though a revolution may overthrow a political regime, the law that governed the interrelations of a people for centuries cannot be revolutionized overnight. However, the legislative commission which drafted the 1921 Civil Code also referred extensively to a series of foreign codes. In addition to the Japan Civil Code of 1898 and Commercial Code of 1899 (revised 1911), and German Codes of 1897, others were the Swiss Civil Code of 1917 and the Revised Swiss Code on Obligations of 1911, the Soviet Civil Code of 1926, the Turkish Code on Obligations and the Turkish Commercial Code of 1936, the Draft Italian Commercial Code of 1925, the Draft Franco-Italian Code on Obligations and Contracts of 1927; see Cheng, *Recent Legislation in China*, 4 CHINA L. REV. 119 (1931).

equality of man and woman. Sons and daughters now shared the estate equally on the father's death intestate, and in order to prevent the exclusion of daughters by will, the Code even instituted the system of the "legitimate compulsory portion."⁸⁷ As a result of the admission of women to the rights of succession, a woman might now have separate estate; the Code introduced the system of "union of goods," which originated in Switzerland, to regulate the position of the woman during marriage in the absence of a special agreement. Under this, the woman retained as her separate estate property for personal use, the products of her labour, and certain other types of property.⁸⁸

Perhaps the most conspicuous characteristic of the Civil Code was the unification of civil and commercial law, commonly separated in other societies. The basis for such a distinction between civil and commercial law is rooted in continental legal history. Since there was a separate class of merchants in the Middle Ages with their own customs, special courts were created to try commercial cases. No such reason existed in China; thus, no useful purpose was served by the separation. In addition, as Dean Roscoe Pound observed, "It [the distinction] requires difficult questions of jurisdiction, procedural distinctions and distinctions of application of law which are simply anachronisms."⁸⁹ Therefore, the "abrogation of the separate commercial law and commercial jurisdiction was a real step forward."⁹⁰

However, some of the important aspects of commercial law were left to be covered by special laws later implemented; negotiable instruments, insurance, commercial companies and maritime commerce were dealt with in four special laws promulgated in 1929. The underlying reason for this might be that it was easier to make amendments to a single statute than to the code. By doing this, the

87. Article 1223 of the Civil Code provides: "The compulsory portion of an heir is determined as follows: 1. For a lineal descendant by blood, the compulsory portion is one half of his successional portion;"

88. Article 1017 provides: "That part of the union property [all property belonging to the spouses at the time of the marriage as well as property acquired by them during the continuance of the marriage becomes their union property] which belongs to the wife at the time of marriage as well as that which she acquires by inheritance or other gratuitous titles during the continuance of the marriage constitutes her contributed property and remains in her ownership."

89. Pound, *The Chinese Civil Code in Action*, 29 TUL. L. REV. 277, 279 (1955).

90. *Id.*

general tenor of the law would be less likely to be disturbed during the development process in China.⁹¹

In regard to criminal trials, Chinese procedure followed the normal continental form rather than the Anglo-American one. Following a preliminary investigation by a procurator, a preliminary examination was held to decide whether the accused is to be committed for trial. Then the public prosecution followed. A necessary corollary of this type of procedure was that lawyers played an insignificant role. Since pretrial interview of witnesses was forbidden for fear they may be influenced by the lawyers, a lawyer's pretrial investigation was largely confined to interviewing his client, possibly members of the client's family, and examining the documents and any real evidence under the client's control. During court trials, the customary rule of lawyers was not that of courageous fighters for the rights of their clients. It is said that their advice to the criminal defendant was often not to deny guilt, but to plead mitigating circumstances in order not to irritate the presiding judge.

Since the judge received and studied the records and dossiers of the police and procurator in advance of the trial, this practice inevitably influenced his attitude towards the disposition of the case. In sum, the trial was actually dominated by the civil law principle of "judicial prosecution," which means that the judge alone controls the proceeding of the trial rather than the "party prosecution" in the American system. In other words, speaking generally, criminal procedure in the civil law countries is "inquisitorial," while that in the common law countries is "accusatorial."⁹²

Another important feature in the adoption of the continental legal system was that in rendering a judgment the court was not bound by strict rules regarding the probative force of evidence, but rather was guided by its own conviction. The examination of evidence was enormously extensive; it could cover any matter deemed relevant to the issues or the credibility of the witness. The Code of Civil Procedure provided in article 222 as follows: "Except where it is

91. *Id.*; *contra*, Charles Sumner Lobingier, a former judge of the United States Court for China, regarded this as constituting "the main features of a code of commerce. Their relegation to separate laws would seem to be even less satisfactory than their combination in a separate instrument." Lobingier, *The Corpus Juris of New China*, 19 TUL. L. REV. 512, 542 (1945).

92. Both systems have their advantages as well as disadvantages. However, this is only true in a historical context according to Merryman of Stanford, because of a converging trend towards roughly equivalent mixed systems of criminal procedure. See J. MERRYMAN, *THE CIVIL LAW TRADITION* 134-39 (1969).

otherwise provided by law, the court, in rendering a judgment, shall decide on the truth or falsity of the facts according to its free moral conviction with due consideration given to all the points raised in the oral proceedings as well as the result of the examination of evidence. The reasons on which the moral conviction is based shall be stated in the judgment." The Code of Criminal Procedure contained similar provisions in the following articles:

Article 154. The facts constituting a crime shall be determined according to evidence.

Article 155. Evidence shall be evaluated by the court according to its free conviction.

This liberal attitude towards the admissibility of evidence in the civil law countries arose from the belief that only by placing all the available information before the court can the truth be discovered.⁹³ In addition, cases are universally tried before trained judges, sitting without juries. There are few exceptions to this rule. Hearsay evidence is not admissible. With regard to evidence obtained irregularly, such as by the *ultra vires* actions of a police officer, the general practice is to admit such evidence.⁹⁴ However, the confession of the defendant will not be admitted if it was obtained by coercion, fraud, illegal detention, or other improper means.⁹⁵

93. Judge Marvin E. Frankel summarized his nine years on the federal trial bench by warning "that our adversary system rates truth too low among the values that institutions of justice are meant to serve." Frankel, *The Search for Truth: An Umpireal View*, 123 U. PENN. L. REV. 1031, 1032 (1975). This is supported by a statement made by an eminent scholar after long and careful study; "He said that if he were innocent, he would prefer to be tried by a civil law court, but that if he were guilty, he would prefer to be tried by a common law court. This indicates that criminal procedure in the civil law country is more likely to distinguish accurately between the guilty and the innocent"; MERRYMAN, *supra* note 92, at 139.

94. This is not only the practice of other civil law countries, but England and the Commonwealth system also refuse to follow the American precedent; see Symposium, *The Exclusionary Rule under Foreign Law*, 52 J. CRIM. L. C. & P. S. 271 (1961). In addition, we shall note here that during the American post-trial pre-sentence procedure, the technical rules of evidence are not generally applicable, *Williams v. New York*, 337 U.S. 241 (1949); *U.S. v. Shipiani*, 435 F.2d 26 (2d Cir. 1970).

95. Article 156 provides that confession of an accused not extracted by violence, threat, inducement, fraud, unlawful detention or other improper devices and consistent with facts may be admitted in evidence. Both France and West Germany have the same exception to the general rule of admissibility; see A. SHEEHAN, *CRIMINAL PROCEDURE IN SCOTLAND & FRANCE* 29 (1975); J. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 69 (1971).

Although these codes were quite advanced according to the then western standard, one thing could not be ignored: they were totally alien to the general public in China. Since the country was not only facing continuing threat from foreign powers, but was also undergoing incessant military actions against the remaining warlords and the Chinese Communists, and since it had only achieved nominal unification under the central government in Nanking, it was impossible to create an efficient, nationwide system for the administration of justice. In the rural areas, the inquisitorial methods of the imperial regime, together with portions of the old codes and moral practices, were still enforced. Because the command of the central government was not carried far enough to reach every part of the country, many modern rules which ran counter to traditional practices were simply put aside. This unfortunate condition would have been temporary and would not have been hard to overcome if China had had more time to develop its legal system.⁹⁶ The disappearance of the old social order and the rule of moral code was imperative to the acceptance of the new legal system. Unfortunately, Nationalist China had failed to realize this goal on the mainland when the war of resistance against Japan broke out in 1937 and the Communists took over in 1949.

F. Legal Reform in Taiwan since 1949.

The legal reforms and provisions of the earlier codes have been maintained by the government of the Republic of China (ROC) in Taiwan. Although the administration of justice is still far from perfect, the westernization of codes continues. Moreover, the influence of the American legal system has been more obvious in recent years as a result of the enormous contact between the ROC and the United States. No longer limited to the sphere of commercial law, other fields of law have also been influenced by American law. Certain American rules of criminal procedure were incorporated into the Code of Criminal Procedure after the 1966 revision.⁹⁷ For instance, police must deliver a criminal suspect to the procurator as soon as possible,

96. Dean Roscoe Pound of Harvard Law School, who had served as legal advisor to the central government at Nanking in 1945-46, praised Chinese codes for being in line with western ideas of law, and was optimistic that, given favorable conditions, the operation of a western legal system would eventually operate in China; see Pound, *Progress of the Law in China*, 23 WASH. L. REV. 345 (1948).

97. See Tao, *Reform of the Criminal Procedure in Nationalist China*, 19 AM. J. COMP. L. 747, 748 (1971). The underlying reason is the dissatisfaction among the Chinese because some due process protections granted to the American servicemen

and he shall be examined not more than twenty-four hours after his arrest,⁹⁸ search warrants must be secured before searching the property or person of a suspect,⁹⁹ and a confession may not be used as the sole evidence of guilt during a trial unless it is proven to have been made voluntarily and corroborative evidence supports it.¹⁰⁰

One of the major problems in the Chinese administration of justice since the modernization has been the control of the Ministry of Justice. The functions of the Ministry include appointing the judges, procurators, and other officials connected with judicial administration. It also directs the procurators and supervises their work in general. It is agreed that these functions are more administrative than judicial, and most of the foreign countries have placed the Ministry under the executive branch. However, China did not accept this conclusion in the past and until 1943 the Ministry was shuffled about several times between the Judicial and Executive Yuan. Since then it has been one of the ministries of the Executive Yuan.

The other controversy, which has not been settled until recently, is the question of the jurisdiction over the courts. Two of the three grades of courts, namely, the high courts and the district courts, together with the whole hierarchy of procurators, have been under the jurisdiction of the Ministry of Justice, which is in turn under the control of Executive Yuan; only the Supreme Court is directly under the Judicial Yuan. The judicial system not only has been split, but its freedom from interference by the executive branch was questionable. This jurisdictional problem evolved into a heated controversy among Yuans and led to an interpretation rendered by the Council of Grand Justices which held that the district and high courts should be under the jurisdiction of the Judicial Yuan.¹⁰¹ This decision is, however, only

after the conclusion of the Agreement on the Status of United States Armed Forces in the Republic of China in 1965 were not equally enjoyed by those who were tried by the same court according to the old Code of Criminal Procedure. For text of the Agreement, see 1 U.S.T. 373, T.I.A.S. No. 5986 (1966). For a discussion of this treaty, particularly in the field of the criminal jurisdiction, see Tao, *The Sino-American Status of Forces Agreement: Criminal Jurisdiction Over American Soldiers on Nationalist Chinese Territory*, 51 B.U.L. REV. 1-30 (1971).

98. Article 91 provides: "If an accused is arrested with a warrant or because of a circular order without a warrant, he shall be sent immediately to the place designated. . . ."

99. Article 128 provides: "A search requires the use of a search warrant."

100. Article 156, para. 2 provides: "Confession of an accused shall not be used as the sole evidence of conviction and other necessary evidence shall still be investigated to see if the confession coincides with facts."

101. Interpretation No. 86.

on paper and not until 1979, did the ROC government decide to implement it and set effective date on July 1, 1980. The details of the interpretation and its effect will be dealt with at length in the following chapter.

In keeping with the French model,¹⁰² an Administrative Court has been established along with the Supreme Court under the supervision of the Judicial Yuan. The court has a number of judges who have been divided into several chambers. The judges are required to have had at least four years of previous service in subordinate positions of due rank.¹⁰³ Among the five judges of each chamber, two must have judicial service.¹⁰⁴ These requirements were devised to insure that the judges will be familiar with the subject matter of the disputes. Administrative suits also can be divided into three grades. Any individual who feels that injury has been done to his rights or interests through an unlawful decision or illegal administrative act on the part of a government organ may bring an action against that authority to the authority immediately higher.¹⁰⁵ If the ruling is unsatisfactory, the petitioner may make a re-appeal to an authority one step higher than the one which renders the ruling. If he still is not satisfied with the decision of reappeal, the last organ he may resort to is the Administrative Court.

The Court considers the argument of both sides, examines the administrative rulings, and renders accordingly a decision against which no further appeal is allowed. Since traditional conceptions still more or less influence the people, their attitude towards the government is passive; generally, to sue the government is a totally alien and unthinkable idea. In addition, their legal knowledge is comparatively inadequate. As a result, only a limited number of ordinary individuals bring actions against government branches and most decisions are rendered favorable to the government.

Another agency which is on a par with the Supreme Court and the Administrative Court in the Judicial Yuan is the Committee on

102. The reasons for establishment of a separate administrative court in France, which has served as a model to other countries in Europe, are the following: the deep-rooted notions about the separation of powers, the widespread distrust of the judiciary as a result of excessive interference with the administrative work of the government before Revolution, the traditional image of the judge and the judicial function. See B. SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND COMMON LAW WORLD* 4-8 (1954).

103. The Organic Law of the Administrative Court, article 6.

104. *Id.*, article 4.

105. The Appeal Law, article 1.

the Discipline of Public Functionaries. Its members enjoy life tenure and a portion of them are drawn from the judicial service.¹⁰⁶ Its major function is handling impeachments submitted by the Control Yuan. The trial is ordinarily conducted by brief and the impeached defendants may be summoned for questioning when the Committee deems it necessary.¹⁰⁷ If the case is connected with criminal matters, the action of the Judicial Yuan has to be delayed until the conclusion of criminal procedures in the ordinary courts. Since the heaviest discipline which it can impose on a public functionary is dismissal and deprivation of the right to hold public office, its significance very often is overshadowed by the pending criminal action. On the other hand, the decision of the criminal court will have no effect on the disciplinary department's application of its own sanctions. The legal process differs from the United States system in that the United States Senate upon conviction in an impeachment trial has the official removed from office. Then he may be indicted and tried for the criminal offense.¹⁰⁸

The quality of justice depends on a multitude of factors. Among them the quality of the bench and the bar are obviously important. As the result of the adoption of the continental civil law system, China also established the career system. The selection of the higher court judges is made through promotion from the lower courts. Although law professors and private lawyers can be recruited into the judiciary,¹⁰⁹ the overwhelming majority of judges come into the profession by passing an examination which any graduate from the department of law of any accredited college or university, both domestic and abroad, can take. Those who hope to practice must pass a judicial examination different in form but identical in subject-matter.¹¹⁰ Another feature of the career system is the assimilation of

106. The Organic Law of the Committee on the Discipline of Public Functionaries, article 1, 2.

107. *Id.*, article 15.

108. U.S. CONST. art. 1, § 3.

109. The Law of Organization of Courts, article 33. However, since the social status of a law professor is deemed higher than that of a district court judge, few professors are willing to accept appointment at the district court level, to which all first appointments are made. Moreover, in addition to this restriction, the attractive income lawyers attain in private practice contributes to the fact that few, if any, judges have been recruited from the bar.

110. Both examinations are extremely difficult, with a rate of only 5% to 15% passing depending upon both the need of the particular year and the caliber of the candidates. This rate can be compared to the Japanese judicial examination, which maintains roughly a 5% pass rate; see Hattori, *The Legal Profession in Japan: Its*

the status of judges and procurators. Both are drawn from the same examination, receive the same judicial training after passing and nearly the same salary, and are subject to the same discipline, though their functions are totally different in nature.

Since legal education is conducted on an undergraduate level which produces students who are less socially mature, and since few practicing lawyers who generally know more about trial technique have ever been recruited into the judiciary, those future judges are, without exception, young and inexperienced. Moreover, the department of law in Chinese schools is not organized solely for training lawyers, its courses are oriented toward a general and essentially theoretical knowledge of law as well as other disciplines such as political science and economics, and most of its students become civil servants or enter private enterprise after graduation. Therefore, for successful candidates a period of training emphasizing the necessary judicial knowledge and skills, namely, the application of the law in the courts and its actual use by the public procurator, is definitely needed. Under the existing system, all successful candidates are required to receive training in the Institute of Training of Judicial Officials for eighteen months. In the first ten months, the training covers class work and research which emphasize the study of cases. All students are then sent to district courts and procurators' offices for six months. Under the latter's supervision, students attend trials and draft indictments and judgments. In the remaining two months, the field work is reviewed and summed up.¹¹¹ It should be indicated here that any candidate who passes the bar examination can practice immediately without any further training.¹¹²

Since the judiciary is organized hierarchically, original appointments are made to the lower posts and vacancies in the higher positions are usually filled by promotion from the lower courts. The reliance upon government for an advancement which results in increased salaries and higher social status is vulnerable to attack for possible abuse by the administrative system.¹¹³ On the other hand, a career judge has the possibility of greater independence from the

Historical Development and Present State, in LAW IN JAPAN 143 (A. von Mehren ed. 1963).

111. For details, see Yang, *Career Judiciary in the Republic of China*, 2 CHENGCHI L. REV. 122, 130-31 (1970).

112. This was the practice of Japan before World War II, which may be the model followed by China. Hattori, *supra* note 110, at 128. But now the Japanese lawyer has to receive the same practical training as that of the judge and procurator.

113. See Yang, *supra* note 111, at 136-49.

influence of pressure groups, be they from politics or business, labor organizations, or others. Furthermore, there is more opportunity to train a career judge adequately for trial work.

Another characteristic of the career system is the lack of active cooperation within the legal profession that can be found in the United States. The typical judge will never have practiced law or served in any other branch of the legal profession. As a result, a judge tends to restrict his professional and social contacts to other judges. The workload of judges, which is much heavier than that of other executive officials, also contributes to judicial isolation.¹¹⁴ In addition, the social status of lawyers cannot be equated with that of judges, as a result of historical and social factors. Until the beginning of the twentieth century, professional representation of the parties in both civil disputes and criminal proceedings was strictly prohibited. Those persons outside the district government who offered their legal services to the public were generally held in disrepute and were commonly called "Song Kouan" (brigands of law suits).

Attitudes and practices developed under the old system have carried over into the present. Traditionally, disputants were encouraged to reach a solution without relying upon legal procedures or the legal profession. Great emphasis is still placed upon the solution of disputes through the mediation process, even in present-day Chinese society. The Code of Civil Procedure expressly provides that the court may at any time attempt a compromise between the litigants in order to reach an amicable settlement, and this agreement is as binding as a definitive judgment.¹¹⁵

114. The average number of cases to be disposed monthly by the district and high courts judges is around 100, and 50 in the Supreme Court. Since the responsibility of Chinese judges includes personally collecting evidence, examining dossiers, holding public trials and writing judgments, their workload is heavier than their counterparts in the west. It is not abnormal for them to work until midnight or on weekends. This workload seriously limits their social life. However, personnel and expenditures will both be increased according to the "Measures for Improving Judicial Administration and Strengthening Judicial Function" which has been adopted recently in the cabinet meeting; see Central Daily News, Dec. 18, 1978.

115. Article 377 provides: "Irrespective of the stage of the proceedings reached, the court may, in the course of oral proceedings, attempt to bring the parties to a compromise or cause a commissioned judge or a requested judge to do the same, when it is considered that there is hope for compromise." Article 380 further provides: "A compromise concluded before the court shall have the same effect as an irrevocable judgment."

CHAPTER III.

THE PROCESS OF CONSTITUTION-MAKING

It is said that constitutional questions in the modern sense did not arise in China until the close of the nineteenth century, around the time of the above-mentioned legal reform movement. The leaders of the abortive "Hundred Days Reform"¹ were definitely influenced by Japan's constitutionalism resulting from the promulgation of the Meiji Constitution in 1889, even though no constructive measures for framing a constitution were taken in that short period. The ultimate goal of this campaign was to constitutionalize the absolutism that had for two thousand years been the characteristic feature of the monarchy. The concept of constitutionalism was thus harbored by more than a few intellectuals. It later inspired a major controversy and was even a major cause in the downfall of the Ching dynasty.

The failure of the Boxer Movement² immediately after the Hundred Days Reform had taught Empress Dowager the painful lesson that only by the restoration of the reform movement could the

1. After realizing the futility of limited learning of western technology, the young emperor Kuang Hsu of the Ching dynasty strongly encouraged more thorough reforms. A series of decrees aimed at modernizing the armed forces, the bureaucracy, the legal and educational systems, and the economy were promulgated. New categories of examination were to be added, new schools were to be integrated into the examination system, universities were established, and agricultural schools were set up in each province. These reforms also included free education to children, a national system of government newspapers, a budget system in government expenditures, promoting the prosperity of merchants, and, most of all, the abolition of superfluous offices both central and local which had duplicate functions or had no function at all. Nevertheless, these reforms only lasted for a brief period of one hundred days in 1898 (June-September). The reforms produced such rapidly increasing consternation among the officials, both high and low, that a *coup d'etat* finally occurred. Empress Dowager Tzu Hsu restored the regency and placed her nephew, Kuang Hsu, under house arrest. This was a major setback for reformers as all the issued edicts were rescinded and most of the reformers were executed. For a succinct but complete account of the "Hundred Days Reform", see Butcher, *The Emperor's Attempt to Reform the Chinese Government in the Summer of 1898*, 43 POL. SCI. Q. 544-65 (1928).

2. The Boxer Movement was anti-foreign in nature, advocating superstitious methods against western weapons. The Empress Dowager lent the movement her encouragement and support. During the frenzied period, the Boxers killed some foreign diplomats and over a hundred civilians and missionaries. After the defeat, heavy indemnities were imposed on China by an international relief expedition.

monarchy be preserved. The years 1901-05 witnessed the adoption of many of the measures which essentially originated in the Hundred Days Reform of 1898 even though the Empress Dowager categorically denied it, conceivably to save face. However, not until the conclusion of the Russo-Japanese War of 1904-05 did the need for establishing a constitutional system in China receive any attention by the imperial court. Japan was so strong that in less than twenty years she had not only freed herself from humiliating extraterritoriality, but had also defeated two colossi of the East, China and Russia. The Chinese public and its government were amazed by Japan's achievements and concluded that it was due chiefly to that country's efficiency in government, which in turn was credited largely to the newly adopted constitution.

Under an increasing demand from the people, events moved rapidly. The government sent out a commission of five officials to Japan, Europe and America to study their constitutional governments in 1905. Upon their return, the commissioners reported favorably on their investigations and urged the adoption of a constitution and parliamentary representation at an early date.³ The government was happy to learn that in the case of Japan, the exercise of constitutionalism had not substantially weakened the imperial authority. As a result, the Ching government decided to commit itself to a program of constitutional change to placate public opinion and at the same time to preserve the autocratic power of the emporor.

On September 1, 1906, the throne issued an edict that expressly declared the adoption of a constitutional government in the near future. (It also reformed law and finance and reorganized the army.) The edict clearly stated that supreme control had to remain in the throne.⁴ Two more edicts, issued in the next year, authorized the establishment of a National Consultative Council and of the Provincial Assemblies respectively to serve as the training ground for the later actual parliamentary system.⁵ A more conspicuous step taken by the Ching government was the promulgation of the proposed "Principles of Constitution" and a "Nine-Year Program (1908-17) of the Constitutional Preparation."⁶

3. H. YEN, A SURVEY OF CONSTITUTIONAL DEVELOPMENT IN CHINA 123-24 (1968).

4. For text, see THE CHINA YEAR BOOK 353 (1912).

5. *Id.*, at 355-56.

6. *Id.*, at 357-63.

It is not surprising to find that the "Principles of Constitution" was a near duplicate of the Japanese 1889 Meiji Constitution, as the latter had served as the model for the former. Not only did a number of articles of the Chinese Constitution correspond exactly to those of the Japanese, but the sequence of articles or order of the clauses was also almost identical in both documents. However, a close analysis reveals that several articles in the Chinese version gave powers to the emperor that were not found in the Japanese original. Article 3 of the Chinese Constitution gave the emperor alone the power to propose laws in parliament, although the Japanese Constitution stated that the Japanese emperor exercised legislative power only with the consent of the Imperial Diet. Article 12 of the Chinese Constitution gave the emperor power to raise funds when parliament was not in session, thus depriving the parliament of its control over the purse strings of the government; no equivalent provision appeared in the Japanese Constitution. The most striking difference is that China's article 29 forbade Chinese members of the parliament to petition the emperor; article 49 of the Japanese Constitution expressly gave this right to members of the Imperial Diet.⁷

Other articles, especially the first, which straightforwardly provided that "The Taching Dynasty [Great Ching Dynasty] shall rule over the Taching Empire for ever and ever, and be honoured through all ages," leave little doubt that Chinese constitutionalism did not imply a lessening of imperial power. All legislative, executive and judicial power was to remain concentrated in the emperor's hand.⁸ This clearly underlined the insincere attitude of the Ching government toward the establishment of a truly modern constitutional system in China.

7. For a fairly detailed comparison, see P.C. HSIEH, *THE GOVERNMENT OF CHINA (1644-1911)* 352-54 (1923).

8. This is evidenced by a number of articles, such as article three: "The Emperor alone has power to make laws, and to decide what matters shall be placed before parliament for discussion." Article four provides: "The Emperor has the power to convoke, to open and to close, to suspend and to extend the time of and to dissolve the Parliament." Article ten provides: "The Emperor has supreme power over the administration of the laws and the appointment of judges, his edicts may supplement laws from time to time." Simultaneously with the promulgation of this "Principles of Constitution," a "Principles of Parliamentary Law" was adopted. Citing a few provisions will sufficiently show the very limited power parliament was to possess. Article one provides: "Parliament has the power to propose legislation, but not the power to legislate." Article two: "Measures adopted by Parliament have not the force of law, and are not to be carried out, until they have received Imperial sanction." Article seven: "Matters discussed in Parliament must be passed by both Houses before they can be memorialized to the Throne for its sanction."

The "Nine-Year Program of Constitutional Preparation," also borrowed from Japan, was so comprehensive that if it had been faithfully carried out, it might have created better conditions in China for the development of a democratic government. Each year certain changes were to take place, such as census taking, judicial reform, police reorganization, the introduction of a budget and auditing system, the introduction of local self-government, the extension of modern educational facilities, the preparation of a constitution and parliamentary law, culminating in the ninth year in the establishment of a parliament, privy council and cabinet.⁹ On the one hand, it was necessary to have the Chinese people gradually go through a process of modern political education in order to be able to govern themselves. Constitutionalism cannot be realized merely by the promulgation of a constitution. However, on the other hand, this nine-year period provided the Ching government time to overcome its weaknesses and further strengthen its absolute rule.

Unfortunately, the latter more accurately expressed the government's attitude. This was reflected in the fact that those plans relating to the drafting of the codes or laws generally came out as scheduled, while as to those programs requiring actual work, little or nothing ever was done. This insincere attitude can be further evidenced by the newly organized cabinet whose members were dominated by imperial clansmen with a prince of blood as premier. Accordingly, in the name of constitutional government, the Ching government learned more from the West and Japan about safeguarding the rights of the government and the throne than about giving to the people their share in the government.

The provincial assemblies were opened in October 1909. Membership was open to all males thirty years of age and older who had the necessary qualifications, which included 10 years residency and literacy. The franchise was opened to all males over twenty-five years of age who were natives of the province and had attained a particular standard of education, held certain public offices, or possessed property or capital valued at \$5,000 or more. Those prerequisites for qualification, of course, degraded the spirit of the democratic election. Nevertheless, the major restriction imposed by the Ching government lay in the fact that the provincial assemblies' function was purely advisory. Those financial propositions which constituted the major concern in every local government could be considered only when brought before them by the governor. All measures adopted by the

9. For text, see THE CHINA YEAR BOOK 361-63 (1912).

assembly required the assent of the governor before they had the force of law.

A Consultative Council was established in the nation's capital on October 3, 1910. Its composition was quite novel. Out of the total membership of two hundred, the Emperor had the right to choose one hundred, the other half being appointed by governors from a list, the product of elections held in provincial assemblies. The traces of a true representative government were thus further eliminated under this peculiar selection procedure. On the surface, the Council's powers were fairly wide: consideration of the national budget, national revenues, and public loans; compilation of new laws and revision of old ones. However, practically every matter within the purview of the Council had to be handled by the cabinet or submitted to the throne before being considered by the council.¹⁰ Therefore, it was only empowered to discuss matters submitted to it by the Emperor.

Another means of limiting the function of the Council was the selection of its president and vice-president. They were not chosen among Council members but were appointed by the Emperor. Moreover, they enjoyed extensive powers ordinarily not shared by the Council members. Only they had the right to petition the Emperor. They had the power to order any member to retire from the session or to deprive him of the right of speech on account of misbehavior.¹¹

Those limitations imposed on both the provincial assemblies and the national Consultative Council certainly justify the conclusion that the object of the imperial government was no more than a perpetuation of the existing system under a thin veil of constitutional guarantees.

However, the assemblies and Council turned out to be far more vigorous than the Ching government had anticipated. Since it was the first time in Chinese history that the people could vote and be elected even on a limited basis, not only did the general public place great expectations on those elected, but representatives were also eager to pursue their business aggressively. In spite of their limited sphere of activities, the provincial assemblies were from the beginning able to exert a considerable influence on the politics of the day. They did not hesitate to oppose unpopular government measures, nor to denounce what they considered the wrongful practices of the

10. The Revised Regulation of the Tzechengyuan (the Consultative Council), article 15. The provisions can be referred to in THE CHINA YEAR BOOK 379 (1912).

11. Articles 45 & 46, *id.*, at 381.

government officials. They even tried to impeach a governor although they had not been granted this power.¹²

The aggressive activities of the national Consultative Council were of equal distinction.¹³ This is particularly significant in light of the Council's peculiar composition. Although members were nominated either by the emperor or the governor, on the most critical constitutional questions, the Council was generally unanimous against the Ching government.

The most prominent demand made by the provincial assemblies and the national Consultative Council was for the early assembling of parliament and a shortening of the time of preparation. Before the opening of the Council, two organized petitions had already been delivered to Peking, both of which were flatly rejected by the imperial court. The representatives of the provincial assemblies constituted the first petition group. Professional and overseas groups joined together with them in launching the second petition only three months later in April 1910. The joining of the Council in the third petition naturally accelerated the pace of this movement. In addition to this, most of the governors also lent their support because they keenly felt the tendency of reviving centralization. Significantly, "even the Manchu nobles and Mongol princes [in the Council] who were supposed to be reactionary joined heartily. Newspapers throughout the country praised the action."¹⁴ Realizing that the ever-increasing pressure could not be stemmed, an imperial edict was issued promising the convocation of parliament for the fifth year instead of four years later.¹⁵ Although some representatives still were not satisfied with this result and organized another two petitions demanding that parliament open immediately, they were treated harshly by the Ching government.¹⁶

The people gradually recognized the Ching government's unwillingness to reform, and the last alternative, revolution, became inevitable. After the outbreak of the Wachang uprising on October 10, 1911,¹⁷ the government made its last effort to save the dynasty by

12. NAN-TUNG CHANG-CHI-CHIH-HSIEN-SHENG-CHUAN-CHI (The Biography of Chang Chi Chih) 142.

13. Comment, *Constitutional Changes in China*, 5 AM. J. INT'L L. 201, 202-203 (1911).

14. *Id.*, at 202.

15. THE CHINA YEAR BOOK 372-74 (1912).

16. For details, see 1 C. LE, CHUNG-KUO CHIN-PAI-NIEN CHENG-CHIN-SHIH (Political History of China in the Last Hundred Years) 282-83 (1942).

17. The revolutionary movement was led by Dr. Sun Yat-sen. Born near Canton in 1866 into a peasant family, Sun received secondary and advanced education in western

the promulgation of the so-called "Nineteen Articles" on November 2, 1911.¹⁸ In sharp contrast to the "Principles of the Constitution," the Emerpor renounced almost all his powers. He could now exercise only the authority that would be delegated to him by law or in accordance with the constitution. The legislature assumed the major powers to govern and as such became almost as powerful as the British House of Commons. In other words, the ministerial responsibility and the parliamentary system which were the British product had been emphasized. Regrettably, it was too good to be true. Had the Ching government announced the "Nineteen Articles" instead of the "Principles of Constitution" ten years earlier, its dynasty might have been saved and a constitutional monarchy might also have been established in China.

After the revolution spread to almost all of the central and southern parts of China, delegates sent by these revolutionary provinces met in Hankow. They took only one day to draft an Organic Law for the Organization of the Provisional Government which elected Dr. Sun Yat-sen as the provisional president. As the Organic Law merely outlined the general organization of the government, while omitting mention of the rights of the people and the procedure of amendment, it cannot, in the strict point of view, be classified as a real constitution. However, in view of the circumstances under which it was composed (the war was still going on against the imperial army in the nearby city of Hanyang), and because it was intended to serve only temporarily, criticism of it should not be too harsh. On the whole, the model of the American presidential system was incorporated.¹⁹

Since both the revolutionary and the imperial government were seriously troubled by insufficient financial reserves and since neither could defeat the other decisively, Yuan Shih-Kai, a man of ability and

medicine in Hawaii and Hong Kong. At first he, like other intellectuals, tried to foster the improvement of the imperial government by presenting a petition to then Premier Li Hung-chang. But he was abruptly turned away and was not even allowed to see Li. Realizing that his ideas would not be acted upon by that government, he made up his mind to overthrow it. After ten unsuccessful armed uprisings, rebels acting in impulsive haste surprisingly defeated the imperial forces at Wuchang, an important city in the middle of Yangtze Valley, and occupied that city overnight on October 10, 1911.

18. For text, see THE CHINA YEARBOOK 628-29 (1925).

19. Article 13 provided that whenever the legislature passed a measure which the President disliked, he might, within ten days after he received such a measure, return it with a stated reason to the legislature for reconsideration; unless it was again passed by a two-thirds vote of the legislature, the President had no obligation to promulgate or execute it. For this and other articles, see *id.*, at 629-30.

ambition who possessed the allegiance of the imperial army, used his skill to play on the fears and weakness first of the one and then of the other side. Eventually he was able to secure a settlement which was comparatively satisfactory to both sides and consequently left him the strongest single factor in the whole nation. In exchange for using his force to help bring down the monarchy, he was awarded the presidency.²⁰ After Yuan gave his unconditional promise of support for the republic, a Provisional Constitution was promulgated on the same day that he was inaugurated. Since those who drafted the Provisional Constitution distrusted Yuan's sincerity, they adopted a provision for ministerial responsibility intended to limit his powers. This was an inevitable departure from the previous presidential system in the Organic Law.

All the important powers were placed in the hands of the legislature at the expense of the executive branch of the government. Moreover, even some fundamental characteristics of the presidential system were also incorporated as additional guarantees. These included confirmation by the legislature of appointments of the cabinet,²¹ and the concurrence of the legislature to declare war and conclude treaties.²² It is clear that these provisions were devised to further restrict presidential authority.²³ However, they also caused numerous unnecessary confrontations between the legislative and executive branch. Professor Willoughby made the following pertinent observation:

The fatal error was made of attempting to avoid the danger of executive autocracy, not by devising means for imposing political or legal responsibility upon the President for acts that he might commit, but by making it constitutionally impossible for him to take essential executive action without first obtaining the

20. It is generally believed that Dr. Sun Yat-sen himself made the initiative of offering Yuan the presidency of the republic after he secured the end of the Ching dynasty.

21. Article 34 of the Provisional Constitution; for text, see THE CHINA YEAR-BOOK 462-63 (1914).

22. Article 35, *id.*, at 463.

23. For an examination of this document and its underlying principles in the light of the constitutions of other nations, especially the cases of the United States and France, see M. TYAU, CHINA'S NEW CONSTITUTIONAL AND INTERNATIONAL PROBLEMS 22-142 (1920).

approval of the parliament — which approval it was often impossible to obtain.²⁴

As the result of a general election in which the revolutionaries controlled the majority of the legislature, serious conflict between Yuan and the legislature became inevitable. The aim of the revolutionaries had been to impose a parliamentary regime on the country. Consequently, it is not surprising to find that a Constitutional Draft passed by them, the so-called Constitution Draft of the Temple of Heaven, was again dominated by provisions limiting executive and augmenting legislative power.²⁵ As Yuan was a man of ambition and influence, he certainly could not live with this Draft. Nevertheless, his several attempts to secure modifications were disregarded and even his delegates were refused a hearing. A drastic measure immediately followed. The Kuomintang, composed mostly of the revolutionaries, was dissolved on the ground that it was a seditious organization. Since the presence of members of the Kuomintang constituted a necessary quorum, this act virtually rendered the legislature incapable of doing any business. Yuan lost no time in securing another Constitution Draft, this time under his direction, and promulgated it immediately.²⁶ All power over the administration was vested in the president; the power of the legislature was cut back.

An astute dictator might have been satisfied with this arrangement, but Yuan was a man of the old regime. He wanted to perpetuate his power and to be an Emperor.²⁷ However, the times had changed and monarchical schemes united the various political parties against him.²⁸ After the annulment of all monarchical decrees

24. W. WILLOUGHBY, *CONSTITUTIONAL GOVERNMENT IN CHINA* 36 (1922).

25. For text, see *THE CHINA YEARBOOK* 490-99 (1914). The place of drafting was the Temple of Heaven, where ancient Emperors had once offered annual sacrifices to Heaven on behalf of the people and pledged their obedience to the divine will that they should minister unto the wellbeing of the root or foundation of the country. Accordingly, this Constitution Draft was known as the Temple of Heaven Draft.

26. *THE CHINA YEARBOOK* 437-43 (1916).

27. It is important to note that a President Election Law, which was also his brilliant product, uniquely provided that not only was the term of office ten years, which is longer than any other country's president, but also that only the incumbent President was entitled to nominate three persons as presidential candidates. Moreover, the incumbent President was also eligible for reelection. For summary, see *CHINA YEAR BOOK* 434-35 (1916).

28. Another significant factor that contributed to the end of the monarchical movement was the reservation of foreign powers. Since it was the time of the First World War, the international situation was so troubled that western powers had to

following Yuan's death, the dissolved parliament reconvened and the Provincial Constitution of 1912 was also revived. Although the final revision of the Constitutional Draft of the Temple of Heaven occupied most of the time of the governmental body, two major controversies prevented it from being effective. One involved the delimitation of powers between central and local government: that is, whether the provincial governors should be elected or appointed and what powers belong to the provinces. Another was the question of joining the Allied Powers to declare war against Germany. Not only did the legislature have different opinions, but also President Li and Premier Tuan were at odds. Under the pressure of local military governors, the legislature was again dissolved by President Li. Some of its members went to Canton to protest the illegal dissolution. Dr. Sun Yat-sen was elected generalissimo and was entrusted to form a separate government in the south. However, elements of the government included military leaders who were not Sun's true followers. It was thus impossible to expect it to function smoothly, and nothing of a constructive nature was ever done to advance the course of constitutional development.²⁹

After the failure of the ridiculous restoration of the Ching dynasty by militarist Chang Hsun, Premier Tuan gained executive power and formed another parliament. In order to emphasize its legitimacy, a new Draft Constitution appeared in 1919.³⁰ This was essentially the same as the Draft Constitution of the Temple of Heaven.

However, another strong faction led by Tsao Kun defeated Tuan in the following year. Tsao was thus scheming for the presidency. At that time, former President Li was called back again for the purpose of disputing the legitimacy claimed by the separate southern government. When Tsao sufficiently prepared himself to be elected

fight for their survival in Europe. They feared Japan would fish in the troubled water which resulted from the confrontation between Yuan and revolutionaries. Japan had not had a particular inclination towards the Republic since its inception, and Yuan himself was even less loved by the Japanese because he had campaigned against the Japanese interests in Korea during the later period of the Ching dynasty. In addition, after very comprehensive intelligence work, the Japanese concluded that opposition against Yuan was considerable and that it was thus unwise to lend support to Yuan.

29. For a detailed examination of the constitutionality of both the Peking and the Canton government, see WILLOUGHBY, *supra* note 24, at 18-27.

30. For text, see W. PAN, *THE CHINESE CONSTITUTION* 179-90, app. F. (1945).

president, Li was ousted in an act of outrageous rudeness.³¹ Some members of the parliament could not tolerate this incident and went south to Shanghai in an attempt to organize another legislature. However, some of them were bribed by Tsao back to Peking to elect him president. In order to divert attention from its ignoble behavior, the legislature hurriedly adopted a Constitution (in only seven days) and promulgated it on October 10, 1923, the same day Tsao Kun was inaugurated.³²

On the whole, the similarities between the Constitution and the Draft Constitution of the Temple of Heaven are considerable. The major difference lies in the distinct powers of the central and provincial government. It is unlike either the Constitution of Canada, where residual powers are not mentioned and belong to the central government,³³ or that of the United States, where the residual powers are definitely reserved to the states.³⁴ The Chinese Constitution stipulated that when any matter arose not specified in the Constitution, it should be under the jurisdiction of the republic if by its nature it concerned the republic, and under the jurisdiction of a province if by its nature it concerned the province.³⁵ Also, the principle of

31. The whole process, summarized as follows, shows the tyranny of warlordism. At first, units of garrison demonstrated before his residence demanding to be financed, and police refused to carry out the order to disperse hooligans who were making noise. Then telephone and water lines were cut off. In response to the demand from Li to discipline their soldiers, the commanders tendered their own resignations. Knowing his helpless situation, he left Peking for Tientsin with the presidential seal, apparently intending to exercise authority there. But he was held prisoner on arrival at the railway station in Tientsin until he gave up the presidential seal and signed the resignation proclamation prepared for him. See F. HOUN, *CENTRAL GOVERNMENT OF CHINA 1912-1928*, 131-32 (1957). However, it is interesting to note that two other famous Chinese scholars disputed a part of this incident by claiming that President Li concealed the presidential seal in a French hospital in Peking; see C. LO, *CHUNG-KUO HSIEN-FA-SHIH* (Constitutional History of China) 192 (1967); II C. LE, *supra* note 16, at 599.

32. For text, see *THE CHINA YEAR BOOK* 694-705 (1925).

33. The opening words of section 91 of the British North American Act of 1867 conferred on the federal Parliament the power "to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces. . . ." It is clear from this language that any matter which does not come within a provincial power must be within the power of the federal parliament. This is said to be designed to create a stronger central government in Canada than exists in the United States. For a detailed examination of a variety of possible dividing lines employed to deal with the distribution of powers in Canada, see P. HOGG, *CONSTITUTIONAL LAW OF CANADA* 241-65 (1977).

34. U.S. CONST. amend. X.

35. Article III.

self-government was extensively emphasized. In other words, the influence of federalism was strongly imbued. The reason for this attitude can be explained by the movement of the provincial self-government. This movement arose as a result of some provinces seeking autonomy in their domestic affairs in order to avoid the conflicts between the north and south as well as their individual continuous factional strife. It first appeared in the Hunan province and spread to several other provinces. However, except for Hunan and Chekiang, both of which drafted constitutions, others only either announced their intent to have self-government or had constitutional drafts. In addition, a gathering of eight civic groups which called themselves the Conference on the State of the Nation in Shanghai in 1922 also drafted a federal constitution.³⁶ In fact, self-government never was realized in any province at all, because it was used by the local military governor to assure himself of a semi-independent position, free from either the interference of the central government in Peking or the encroachment of the neighboring military governors.

In 1924 military strife brought down Tsao Kun and his Constitution. A new Constitution Draft was promulgated in 1925 which resembled the former Constitution except that the lines of the federal system were more clearly drawn.³⁷

In the following three years the Peking government did not even need to pay lip service to the drafting of a constitution in order to legitimize its regime. In short, within seventeen years five constitutions or constitution drafts had been sponsored by the government after the establishment of the republic in 1911, not to mention numerous constitutions drafted by private persons or organizations. Despite the utterly discredited versions, the 1923 Constitution was doubtless the best drafted because it was the product of the Constitution Draft of the Temple of Heaven which not only represented a new spirit at the time it was drafted, but was also much debated and was reviewed several times by the parliament. Nevertheless, constitutionalism cannot be realized merely by the promulgation of a single paper. Since militarists controlled both the central and local government, they almost invariably devised constitutions that promoted their own personal interests. The real meaning of constitutionalism did not concern them at all. Thus constitution-making during this period was simply a farce.

36. For text, see LO, *supra* note 31, at 181-82.

37. For text, see CHINA YEAR BOOK 1234-48 (1926).

The preceding discussion has shown that the 1911 revolution failed to build a new Chinese state based upon the western idea of a constitutional parliament and cabinet. What are the reasons for this failure? First, elements of the revolutionary party were largely recruited from overseas Chinese, students studying abroad, members of the new model army, and several secret societies. These groups had no common objective beyond the overthrow of the Ching government. Very few of them had a thorough understanding of the real spirit and method of constitutionalism and democracy. Second, the 1911 revolution had failed to bring about far-reaching changes in social, political, and ideological areas. The old bureaucracy and military establishments, personified by an ambitious general, were left intact. Third, the success of the revolution was based not upon the people, but upon the local governments of the various provinces. In other words, the revolutionaries had not been able and indeed had seldom attempted to mobilize mass support on a large scale either in the cities or in the countryside.

The chaotic condition was brought to end, at least nominally, by the Kuomintang or Nationalist Party in 1928 after the successful Northern Expedition against the warlords. According to Dr. Sun, the founder of the party, the first phase of national reconstruction — the period of military operation — had been completed and the next stage of political tutelage was to begin. Its underlying purpose was to educate the people to exercise their political rights. Beginning in the village and county, the Kuomintang were to organize local self-government and finally elect delegates to form the National Assembly, whose duties were the adoption of the constitution and the establishment of a government in accordance with its provisions. All of this having been accomplished, the country would enter the last phase — constitutional government. During this period the party was to be entrusted with the responsibility of nursing the country until the country was strong enough to look after itself. A necessary corollary to this was the supremacy of the Kuomintang.

The "Provisional Constitution of the Political Tutelage Period" clearly bears witness to this assumption.³⁸ Article 30 provides that:

38. For text, see PAN, *supra* note 30, at 247–55, app. L. The adoption of the Provisional Constitution was the reaction to the promulgation of a Constitution Draft (Taiyuan Draft), which was drafted by some famous figures who wished to maintain their own forces and resisted the ascendancy of Chiang Kai-Shek; they nevertheless failed in the following civil war. See T. CH'EN, *THE GOVERNMENT AND POLITICS OF CHINA* 137 (1967).

During the period of political tutelage, the National Congress of the Kuomintang delegates (Kuo-Min-Tang-Ch'uan-Kuo-Tai-Piao-Ta-Hui) shall exercise the governing powers on behalf of the National Assembly (Kuo-Min-Ta-Hui). During the adjournment of the National Congress of the Kuomintang, the Central Executive Committee of the Kuomintang shall exercise the said powers.

All the important offices of the government, including that of president, were filled by persons selected and appointed by the Central Executive Committee of the Kuomintang.³⁹ The government doubtless was to be under the direction and supervision of the Kuomintang.⁴⁰ However, we must bear in mind that the party dictatorship was never supposed to last for an indefinite period. The preamble to the Provisional Constitution also clearly spelled this out. The fact that the Kuomintang had to fight continuously against its own separatist elements, Communists and Japanese, however, slowed any progress toward the early termination of political tutelage.

Nevertheless, there was impressive progress in the area of material construction: currency was unified, a revenue system and budget were established, banking institutions were reformed, modern industries were developed, and railroad and highway construction were undertaken.⁴¹ The most notable success during this period was in the area of foreign affairs. Instead of resorting to unilateral abolition of treaties imposed by foreign powers, the central government carried on several negotiations. The Sino-American treaty, which was the first to establish the principle of complete tariff autonomy, was signed

39. Article 72.

40. Political tutelage is often labeled undemocratic. However, the essential of a successful democracy lies in the existence of necessary conditions. In the case of China, not only had illiteracy been high, but also the living standards as well as the experience in self-government were low. There was a definite need for a training period before the commencement of a constitutional government. Professor A.N. Holcombe made a discerning observation by stating: "It is evident that his [Dr. Sun] distinction between the different stages of revolutionary process is sound. . . . The period of tutelage when it shall have been securely established, will make an undoubtable advance." A. HOLCOMBE, *THE CHINESE REVOLUTION* 312 (1931).

41. For a detailed discussion of China's economy and finance during this period, see Young, *China's Fiscal Transformation, 1927-1937*; Chang, *Toward Modernization of China's Currency and Banking, 1927-1937*, in *THE STRENUOUS DECADE: CHINA'S NATION-BUILDING EFFORTS, 1927-1937*, at 83-170 (P. Sih ed. 1970). Hung-Hsun Ling also gives detailed account of the Communication construction; see *A Decade of Railroad Construction, 1926-1936*, at 255-88.

on July 25, 1928.⁴² This was followed by treaties with other countries.⁴³ By 1930 the central government was also very likely to secure treaties with all minor foreign nations by abolishing the extraterritorial rights of their citizens.⁴⁴ However, not until 1943 did Britain and the United States lead the way to surrender of their extraterritorial rights.⁴⁵ Five foreign concessions among twenty-six had been relinquished by foreign powers through the efforts of the central government.⁴⁶ The aim of equality in the international society was not far from being reached.

On the other hand, the Kuomintang itself should not be exonerated for its failure to enforce effectively those tasks entrusted to it.⁴⁷ This is especially true on the local level where the members of Kuomintang seriously impeded the development of self-government, its central responsibility. As a result, many became impatient with the lack of significant progress. The demand for drafting a constitution spread rapidly, receiving greater impetus after the Japanese

42. For text, see CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, *TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA 1919-1929*, at 230-31 (1929); see generally Dennis, *Treaty Regulating Tariff Relations Between the United States and China*, 22 AM. J. INT'L L. 829-32 (1928).

43. These treaties were concluded during the last two months in 1928. The list includes Norway (November 12), Italy (November 27), Denmark (December 12), Portugal (December 20), France (December 22), and Spain (December 27). For texts, see *id.*, at 273-38, 243-73.

44. Originally, there were nineteen countries which enjoyed the right of extraterritoriality in China. Except for Austria-Hungary and Germany, which lost their right as a consequence of World War I, and the Soviet Union, which voluntarily relinquished it after the Bolshevik Revolution, Belgium, Denmark, Italy, Portugal, and Spain agreed to its termination when other participating states of the Washington Conference of 1921-1922 or the majority of states enjoying extraterritoriality would agree to do the same. Brazil, Norway, and the Netherlands also expressed their willingness to comply with the Chinese desire to terminate extraterritoriality; see W. TUNG, *CHINA AND THE FOREIGN POWERS: THE IMPACT OF AND REACTION TO UNEQUAL TREATIES* 254-57 (1970).

45. For the texts of these two treaties, see Y. CHEN, *TREATIES AND AGREEMENTS BETWEEN THE REPUBLIC OF CHINA AND OTHER POWERS 1929-1954*, at 140-55 (1957). A comprehensive study of the origin, development and the abolition of the extraterritoriality in China is provided by W. Fishel in *THE END OF EXTRATERRITORIALITY IN CHINA* 145-87 (1952).

46. Great Britain relinquished her concessions in the following cities: Hankow and Kiukiang in 1927, Chinking in 1929, and Amoy in 1930; Belgium returned her concession in Tientsin in 1929. For texts, see CARNEGIE, *supra* note 42, at 205-16, and CHEN, *supra* note 45, at 18-20, 63-65, 1-6.

47. Even a sympathizer of the Kuomintang has to admit this inefficiency; see W. TUNG, *THE POLITICAL INSTITUTIONS OF MODERN CHINA* 128 (1964).

invasion of Manchuria, the northeast part of China, in 1931. Recognizing that the popular demand was too strong to resist, the Kuomintang began to draft a constitution by the Legislative Yuan even though not a single province had had local self-government, which was the prerequisite for the period of constitutional government according to Dr. Sun's teaching.

The first draft, which appeared in June 1933, was solely the product of Dr. John C.H. Wu.⁴⁸ In order to solicit comment and criticism, it was released to the public. After examining those critical responses, another draft known as the Preliminary Draft of the Constitution of the Republic of China was completed and again released. Since the public continued to react to this version, the drafting committee had to revise the Draft. This Draft later went through three readings and when published by the Legislative Yuan was known as the "First Draft of the Constitution of the Republic of China."

After receiving instructions from the Central Executive Committee of the Kuomintang, the Legislative Yuan undertook to draw up the necessary amendments and promulgated the "Second Draft." Again, the Kuomintang produced its commentary on the Draft and the Legislative Yuan had to make further revisions. It was finally promulgated by the National Government on May 5, 1936 and was popularly known as the "Draft Constitution of Double Five."⁴⁹

It seemed that a permanent constitution would soon be promulgated. Nevertheless, the election of delegates to attend the National Assembly which would be charged with the responsibility of drafting a final constitution encountered difficulties since some parts of the northern provinces were then under the control of a semi-autonomous regime which was supported by the Japanese. After full-scale war broke out in July 7, 1937, an indefinite postponement of the convocation of the National Assembly was inevitable.

In retrospect, we have to acknowledge that in draftsmanship this latest version was far superior to all the earlier drafts. It was the result of tedious work by the Legislative Yuan for a period of more

48. It is interesting to note that Dr. Wu was one of several intimates of the late Mr. Justice Holmes of the United States Supreme Court. Their relationship began when Dr. Wu sent an article about ancient Chinese law published in the *Michigan Law Review* to Justice Holmes for comment. Their friendship lasted for eleven years (1921-32). Their intimate correspondence was collected in *JUSTICE HOLMES TO DOCTOR WU*.

49. For the major differences between these various drafts, see T. CH'EN, *supra* note 38, at 298-303.

than three years. Most of all, the political theories bequeathed by Dr. Sun Yat-sen had been strictly adhered to.⁵⁰ For example, in addition to the five-power government which combined the typical western doctrine of separation of powers and the two traditional Chinese systems of the censorate and civil service examination,⁵¹ Dr. Sun had made a brilliant demarcation between the power of the people (political power) which included election, recall, initiative, and referendum, and the power of the government (governing power) which performed its functions through the five Yuans. The former would be exercised by the National Assembly, which was to be the organ that government was responsible to. Accordingly, not only the president and vice-president, but also the members of the Legislative and Control Yuan were to be elected and subjected to recall by the National Assembly,⁵² which would be composed of delegates elected by popular vote.

50. A detailed examination of the provisions of the Draft can be found in PAN, *supra* note 30, at 64-88.

51. In the whole structure of the imperial Chinese government two institutions were particularly noteworthy. One was the censorate, the other, the civil service examination. It is generally agreed that the service provided by the censorate to the traditional Chinese government was unique. Briefly, it surveyed governmental activities and exposed violations of law and derelictions of duty by government personnel, with the intent both to purge the administration of incompetence, arbitrariness, and malfeasance and to stimulate the implementation of prevailing political doctrine. See Hucker, *The Traditional Chinese Censorate and the New Peking Regime*, 45 AM. POL. SCI. REV. 1041 (1951). Like the censorate, the competitive examination system for civil service is another unique contribution made by the Chinese. For detail, see Teng, *Chinese Influence on the Western Examination*, 7 HARV. J. ASIA STUD. 267, 268-70 (1943). In a centralized government the examination system accomplished several things: uniformity in written language was achieved; communications between localities and the capital were strengthened; and most of all the throne was stabilized by controlling the thought of the leading social group and channeling it into the lines of an official ideology which emphasized the principles of loyalty and service. On the other hand, this system had the unhealthy tendency to stupefy the active minds of the race, particularly after the overformalization of essay writing and the overemphasis on calligraphy and poetical composition in the Ming dynasty. This, combined with the continuing ignorance of the importance of science and technology, might have contributed to the lack of an active and fruitful response to the new problems and ideas resulting from the interchange with western culture. See W. FRANKE, *THE REFORM AND ABOLITION OF THE TRADITIONAL CHINESE EXAMINATION SYSTEM* 25-27 (1960). In spite of all these defects, the main argument for the examination was that it facilitated social mobility and insured the government a continuing supply of new blood. Therefore, to the western practice of dividing the government into the executive, legislative, and judicial branches, the Chinese system added two more, the examination and the control. The Five Yuan (branches) stand on equal footing and the president is above them as the head of state.

52. Article 32.

Contrary to the common belief, the war did not necessarily stifle the development of democracy in China. Since this was an "all out" war against foreign aggression, the nation had to achieve unity and solidarity in order to overcome so powerful an enemy. The People's Political Council was brought into being. Although not all members were elected by popular vote, they represented all of the existing political parties including the Communists. In spite of the seemingly undemocratic means of choosing its members and its limited functions, its work was comparatively satisfactory. Several committees within the Council dealt with reviewing the Draft Constitution of Double Five which had been established without producing any concrete results.

Immediately after General Marshall came to China to serve as a mediator between the Kuomintang and the Communists, the "Political Consultative Conference" was held in Chungking from January 10 to January 30, 1946. It was composed of 29 delegates representing different political parties and groups. A number of radical revisions were proposed by it. Among them, the National Assembly, the essential part of the original system of government, was to be abolished and the president was to be elected and recalled by representatives of the county, the provincial and central assemblies, before popular elections were to be held; a system of ministerial responsibility was to be adopted with the Executive Yuan corresponding to the cabinet and the Legislative Yuan corresponding to the parliament; the Control Yuan was to be transformed into an upper chamber, elected by the provincial assemblies and exercising the functions of consent, impeachment, censure, etc.

Predictably, these changes were difficult for the Kuomintang to accept. However, after reaching a compromise between the Kuomintang and other political parties — save the absent Communists — the National Assembly was restored, but with a very limited function. Moreover, the influence of the cabinet government was reduced by depriving the Executive Yuan of its right to dissolve the Legislative Yuan and by failing to provide the Legislative Yuan with the no-confidence vote characteristic in other parliament countries.⁵³

53. C. LIN, CHUNG-HUA-MIN-KUO HSIEN-FA SHIH-LU (An Analytical Study of the Constitution of the Republic of China) 116 (1975). However, Ch'ien Tuang-sheng maintained that no compromise had been reached and the Reviewing Committee of the Political Consultative Conference simply followed the wish of the Kuomintang; see CH'EN, *supra* note 38, at 319. James D. Seymour concurred with this argument; see Seymour, Republic of China, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 9 (A. Blaustein & G. Flanz ed. 1974). A close and further examination of those

This latest draft has served as the basis for the Constitution of 1946 and it has been and still is the fundamental law of Nationalist China.⁵⁴

The promulgation of a constitution did not bring China into the era of constitutionalism. On the contrary, the civil war accelerated to an unprecedented extent. Amidst the war, the first session of the first term of the National Assembly convened at Nanking in 1948. Although proposals to amend the Constitution were numerous, it was hardly conceivable that many radical amendments would be passed, particularly since the constitution had been enacted only sixteen months earlier and some three-fourths of the delegates were the same persons who attended the Constituent National Assembly which had produced it. Finally, instead of any formal amendment to the Constitution, the "Temporary Provisions for the Duration of Mobilization to Suppress the Rebellion" [hereinafter referred to as the Temporary Provisions] were adopted, though in fact their adoption followed the procedures prescribed for the amendment to the Constitution.

According to these provisions, the President was permitted, for the period in question, by resolution of the Executive Yuan Council,⁵⁵ to take any emergency measure in order to prevent the state or the people from facing immediate dangers or to cope with serious financial or economic crises as prescribed in articles 39 and 43 of the Constitution, without being subject to the procedural restrictions of the Legislative Yuan. These two articles were the origin of the President's emergency powers. The first provides that the President may declare a state of siege but has to secure previous approval or subsequent ratification by the Legislative Yuan, which may ask the President to lift the state of siege by resolution. The second provides that the President in the case of natural calamity, epidemic, or a

amendments and provisions of the Constitution later adopted by the National Assembly reveals that almost all of the letter and spirit of the amendments were incorporated into the Constitution. This was made at the insistence of Chiang Kai-shek in hopes that the Communists would thus have gone back to the peace talk; see Y. CHIANG, *CHUNG-KUO CHIN-TAI-SZU CHUAN-LIEH-TIEN* (The Turning Point of Modern Chinese History) 175-76 (1976). It is important to note here that Mr. Chiang had actively participated in the Political Consultative Conference as well as the National Assembly and he is the member of China Democratic Socialist Party.

54. For text, see TUNG, *supra* note 47, at app. G.

55. The Council is composed of the premier and vice-premier of the Executive Yuan, heads of the ministries and commissions and Minister of State with the premier as chairman. It is responsible for discussion and finalization of statutory or budgetary bills, and other important matters to be submitted to the Legislative Yuan.

serious financial or economic crisis may, when the Legislative Yuan is in recess, by resolution of the Executive Yuan Council, issue emergency decrees, but they have to be confirmed by the Legislative Yuan within a month.

Given the fact that a civil war was in full swing, not only did military efforts require strengthening, but also economic measures were desperately needed to save the country from bankruptcy. The extension of Presidential power was understandable. However, we should question the necessity of exempting the restriction imposed by article 39, particularly since the Legislative Yuan could always subsequently confirm the declaration of state of siege; the immediate action taken by the President to deal with any exigency could hardly have been impeded.

The only restriction which now may be placed on the new extensive presidential power is that under article 57 the Legislative Yuan may by resolution ask the Executive Yuan to modify or annul such presidential power. Nevertheless, article 57 provides that the President can veto such a resolution, which in turn can be overruled only with a two-thirds majority. It is scarcely conceivable that the President could not even command a following of one-third of the Legislative Yuan. Accordingly, the wisdom of drafting the "Temporary Provisions" was manifestly questionable and the criticisms of its unwarranted expansion of the presidential power have force.

A series of four amendments have been attached to the "Temporary Provisions," two of which are worthy of mention here.⁵⁶ The first amendment, which was adopted in 1960, waived the restriction placed by the Constitution against a third-term reelection of the President.⁵⁷ The reason was obvious. The continuing leadership of President Chiang Kai-shek was necessary to maintain the political continuity and stability of the government. During that time he was the only person with a significant enough reputation to be identified with all of China and keep the economic and political transformation in Taiwan proceeding smoothly. The last amendment, adopted in 1973, authorized the government to conduct supplementary elections in the areas it actually controlled. Since 1971 when it lost its seat in the United Nations, Nationalist China has suffered a series of severe

56. Two other amendments not given in detail here relate to the enforcement of initiative and referendum by the National Assembly and the creation of some government agencies. For details, see Cheng, *A Study on the Temporary Provisions of the Constitution of the Republic of China*, 13 CHINA CULTURE 4: 38-57 (1972).

57. Article 47.

diplomatic setbacks. These setbacks have had repercussions in its domestic politics. In particular, a movement toward internal political modernization has been initiated. One of its major goals was the solution of the problem of attrition in the membership of the national representative groups due to age. Of the 2961 National Assembly members elected in 1947, only 1393 were still serving in 1971; of the 759 members of the Legislative Yuan, 434 remained; and in the Control Yuan, where the average age of members was over sixty-five years,⁵⁸ membership declined from 180 in 1949 to 69 in April 1971. Because it claims to be the only government of China, the Nationalist Chinese government was reluctant to hold a general election in Taiwan. Nevertheless, the ROC government has had to recognize the phenomenon of political stagnation and the rising demands of its local residents to participate in the policy-making process. As a result, in 1972, 53 new members were elected to the National Assembly, 36 to the Legislative Yuan, and 7 to the Control Yuan. Their terms are three (Legislative Yuan) and six years (Control Yuan and National Assembly), respectively, according to the provisions of the Constitution.

On June 11, 1980, the Government announced the further expansion of the number of new members for the above three bodies. In total 204 new members will be elected in Taiwan — 76 to the National Assembly, bringing the total to 1218, 96 to the Legislative Yuan, bring the total to 412, and 32 to Control Yuan, bringing the total to 74.⁵⁹ Among the three bodies, the most important one is the Legislative Yuan. The election of 96 new members to this body would significantly revitalize that body. Moreover, many remaining members are too old or ill to be active. As a result, less than half of the remaining members regularly attend the meetings of the Yuan. So, in practical terms, after the recent increase of the membership, approximately half of the active members of the Legislative Yuan will be elected in Taiwan.⁶⁰

58. See generally, Wei, *Political Development in the Republic of China on Taiwan*, in CHINA AND THE QUESTIONS OF TAIWAN 74–111 (H. Chiu ed. 1973).

59. *Parliamentary Seats Added*, 21 FREE CHINA WEEKLY 1 (No. 23, June 1980).

60. See Hungdah Chiu, *The Future of Political Stability in Twaiwan*, in TAIWAN: ONE YEAR AFTER UNITED STATES-CHINA NORMALIZATION (A SENATE FOREIGN RELATIONS COMMITTEE WORKSHOP) 40–41 (June 1980).

On the provincial and local levels, however, self-government has been fully practiced on Taiwan since 1951. With the exception of the governor, who is appointed by the Executive Yuan, all chief executive officials and members of the legislative assemblies have been chosen by direct vote of the people.

CHAPTER IV

PROCEDURAL ASPECTS OF JUDICIAL REVIEW

A. Reasons for Establishing a Specialized Constitutional Court

After reviewing the history of Chinese Constitutions, one may ask, assuming that the current constitution may not be changed in the near future because of the political realities, how can it adapt itself to the changing political and economic setting? In other words, how can the constitution continue to remain inviolable and yet not hinder the rapid development of the country? A sound system of constitutional interpretation is needed; in essence, this is the system of judicial review in the constitutional context. Under this system, judges interpret the constitution in such a way that it still serves as a supreme living law in daily life even though it was actually drafted years ago. Thus it can maintain its highest place in a hierarchy of legal norms within a country by striking down those statutes which conflict with it.

Neither the "Principles of Constitution" nor the "Nineteen Articles" promulgated by the Ching government mentioned the system of judicial review. The first provision for judicial review appeared in the Constitution Draft of the Temple of Heaven of 1913. The power of interpretation of the future Constitution belonged to the legislature,¹ a conclusion drawn from the French model of government in which the legislature has full authority to interpret its own statutes. The 1919 Constitution Draft adopted a system that entitled only the leaders of the legislature and judiciary to compose a special conference handling the task of interpretation.² Although the Constitution of 1923 still followed the principle of parliamentary supremacy with minor revision,³ it established that the Highest Court of Justice had the authority to pass judgment on conflicts between national law and provincial law.⁴ The 1925 Constitution Draft seemed to move a

1. Articles 112 & 113.

2. Article 101.

3. By relaxing the quorum for passing a decision from two-thirds presence and three-fourths concurrence to two-thirds presence and concurrence provided in article 141.

4. Article 28.

step toward the creation of a special constitutional court whose members included a chief justice, four other justices of the Supreme Court and four other persons nominated and elected by the legislature.⁵

Since the National Government was guided by the Kuomintang during the political tutelage period, the Central Executive Committee of the Party had the final say on those conflicts between statutes and the "Provisional Constitution during the Period of Political Tutelage."⁶ A variety of devices were proposed during the draft of "Constitution Draft of Double Five."⁷ It was finally decided that "the question [of] whether a law is in conflict with the Constitution shall be settled by the Control Yuan submitting the point to the Judicial Yuan for interpretation within six months after its enforcement."⁸ However, it failed to decide whether the Supreme Court or another specialized court which it would create within the Judicial Yuan was to assume the task.

Although the American practice of judging the constitutionality of laws by regular courts has been followed by a number of countries, an alternative was established in Austria in 1920 with the creation of a Constitutional Court that specializes in this function.⁹ There were several reasons for this structural change. Since the principle of *stare decisis* is not a part of the civil law system, at least in theory, courts are not generally bound even by the decisions of the highest court.¹⁰ Thus, there may theoretically exist a conflict among courts on the question of whether a statute is constitutional.¹¹ Furthermore, the existence of a separate administrative court independent of the regular courts which occasionally had to apply the same statutes as

5. Article 94.

6. Article 85.

7. See generally T. TSAO, THE CONSTITUTIONAL STRUCTURE OF MODERN CHINA 164-65 (1947).

8. Article 140.

9. Since the United States Supreme Court has limited its jurisdiction in the public law area through the procedure of *certiorari*, the contrast between these two systems, at least in terms of the nature of the work handled by them, may not be so stark; see Frankfurter and Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1, 18 (1928).

10. As a matter of fact, since one important indicator in deciding the promotion of judges in lower courts is the rate at which their decisions are upheld by the higher courts, they simply cannot risk ignoring the lines laid down by the decisions of superior courts.

11. However, it is arguable that the danger of a lack of uniformity is not so great under such a unified country as Austria in which no state court exists at all.

the ordinary court aggravated the possible contradiction among judicial organs.¹²

Most of all, the exercise of judicial review differs in character as well as in meaning from those functions performed by an ordinary court. It extends into the field of politics. The constitutional judge has to relate every clause of the constitution to political reality. In other words, he must, more than the ordinary judge, also understand something of the essence of politics and of those social forces which determine political life. However, judges in civil law countries are career judges who generally enter the judiciary soon after graduation from the university, where their training has emphasized strict legal-analytical studies. These civil law judges simply do not have the opportunity to acquire practical experience. As a result, they inevitably promote a narrow application of the letter of the law and can hardly be expected to make any effort to question the legality of a provision in a statute.¹³ Hence in civil law countries it is highly advisable to create a specialized constitutional court, whose members are drawn from a variety of backgrounds outside the bench.

By explicitly providing in article 171 of the current Chinese Constitution that "laws that are in conflict with the Constitution shall be null and void," the principle of judicial review is firmly established. Article 173 vests the power of constitutional interpretation in the Judicial Yuan. In addition, article 78 of chapter seven reiterates that "the Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders." This chapter includes articles 77-82, which are equivalent to Article III of the United States Constitution. Since the Judicial Yuan is the highest organ of the state and is charged with civil, criminal and administrative cases, it may appear that the American model of judicial review was followed. The next article, however, clearly suggests the opposite since it provides that "the Judicial Yuan shall have a certain number of Grand Justices to take charge of matters specified in article 78 of this Constitution, who shall be nominated and, with the consent of the Control Yuan, appointed by the President of the Republic." A specialized tribunal is thereby created above and

12. Kelsen, *Judicial Review of Legislation*, 4 J. POL. 183, 186 (1942).

13. The cases of Weimer Germany and Italy from 1948-1956 amply evidence the unsuitability of the so-called "decentralized" American system in civil law countries. For an excellent treatment on the rationale of establishing the "centralized" judicial review, see M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* 53-66 (1971).

outside the regular court structure. Accordingly, the Chinese Constitution not only recognizes the principle of judicial review, but also establishes a special court to pass judgment on constitutional questions.

B. Members

The Constitution leaves the composition of the Council of Grand Justices entirely to enabling legislation. The Organic Law of the Judicial Yuan, adopted by the Legislative Yuan on March 31, 1947, to become effective simultaneously with the new Constitution, further affirms in article 3 that there shall be a Council of Grand Justices in the Judicial Yuan, composed of seventeen such Justices.¹⁴ The American lawyer accustomed to a nine-member court, may consider this number of justices too large. As a matter of fact, the United States may be the only country having a nine-member court.¹⁵ Again, in contrast to an absence of any constitutional or statutory qualifications for the Supreme Court Justices of the United States,¹⁶ article 4 of the Organic Law of the Judicial Yuan explicitly provides that only those persons who have one of the following qualifications shall be eligible as a Grand Justice:

1. having served as a justice of the Supreme Court for more than ten years with a distinguished record of service;
2. having served as a member of the Legislative Yuan for more than nine years and having contributed significantly to its activities;
3. having taught for more than ten years some major courses at a university or college, and produced some specialized writings in the field of law;
4. having been a justice of the International Court or an author of some authoritative books in the field of public law or comparative law, and

14. Article 3.

15. The Constitutional Council of the Fifth French Republic consists of nine appointed members, but in addition thereto all former Presidents of the Republic are *ex officio* members for life. Some countries even have an even number of justices, ranging from Ireland with six, to West Germany with sixteen, and Switzerland with twenty-six.

16. However, a law degree has been considered to be an unwritten prerequisite for membership in the Supreme Court as well as other federal courts in the United States; see H. ABRAHAM, JUSTICES AND PRESIDENTS 41 (1974).

5. being erudite in jurisprudence and having experience and renown in politics.

Paragraph two of the same article further stipulates that the number of Grand Justices appointed by virtue of each of the above items shall not exceed one third of the total number.

Whether one favors the American or Chinese method of choosing the members of the court is a matter of personal preference. Among those countries that established a special constitutional court, almost all regulate the composition of the court.¹⁷ A country without any experience in creating the system of judicial review needs detailed regulation to insure that the backgrounds of its court members will be diversified; this characteristic is particularly desirable in the formative stages of the court.

Lawyers were deliberately excluded from the above categories, which provides further evidence that their status needs to be raised. Because of the non-litigious character of the society and its emphasis on informal as well as personal means of resolving disputes, the lawyer's skill has historically been neither especially needed nor valued. Although the prestige of the Chinese lawyer seems to be on the rise — a result of the rapid development of a more complex society in a recent decade — compared with its American counterpart, it still has a long way to go. Still, there is the view of the Japanese that lawyers are often reluctant to sit on its Supreme Court, which decides constitutional cases incidental to regular litigation, because this position generally is not lucrative compared to business law practice.

Although President Eisenhower deemed prior judicial experience crucial for nomination to the United States Supreme Court, only twenty-two among one hundred justices had ten or more years of previous judicial experience on any lower level court before they were appointed. Yet forty-two justices, including some who were regarded

17. *E.g.*, three of the sixteen members of each senate of the West German Federal Constitutional Court must be professional judges; fifteen Italian constitutional justices have to be drawn from among the high bench, university professors of law and attorneys of twenty years' standing. Although under heavy American influence, the Court Organization Law of Japan explicitly provided that ten of the fifteen members of its Supreme Court must have had at least ten years' experience as regular judges or a total of twenty years' experience as summary court judges, lawyers, procurators, or law professors (art. 41 sec. 1). In practice, the pattern of maintaining a definite share in three categories of judges — five from the bench, five from the bar, and five from the persons of knowledge and experience — has been followed ever since its inception.

as the greatest, such as Marshall, Brandeis and Warren, had never been on the bench before.¹⁸ An oft-quoted remark made by Justice Frankfurter applies here: "One is entitled to say without qualification that the correlation between prior judicial experience and fitness for the Supreme Court is zero."¹⁹

Nevertheless, the necessity of having a certain number of justices drawn from the judiciary should not be ignored. Unlike all of the United States Supreme Court Justices who have had extensive legal, though not judicial, experience in actual life before their appointment,²⁰ the legal profession in civil law countries is separately divided. A young law student ordinarily chooses his future occupation as judge, procurator, lawyer, civil servant, or law professor after graduation and generally sticks with it forever. Although it is theoretically possible to move from one of these professions to another, such moves are comparatively rare. It is thus possible that someone appointed to the constitutional court may never have practiced law to any extent or may have never attempted to take the bar examination at all. Total unfamiliarity with the legal procedure is conceivable. Another overriding consideration favoring the selection of persons with previous judicial experience in those countries is that they certainly have acquired some habits of independence, having remained at a considerable distance from actual politics. This is an extremely precious quality for the highest court undertaking constitutional review.

Since the trial judge is mostly concerned with the laws of procedure and evidence, it is natural that he tends not to question the articulated doctrines of law. This is especially true when applied to civil law judges. Because they enter the judiciary while still quite young and inexperienced in regard to practicalities and since their advancement is relatively slow and based to a considerable extent upon seniority, strong judicial personalities and judicial lawmaking like those in America can hardly be developed. A traditional attitude of legal dogmatism and inflexibility is the natural consequence. Speaking of these career judges, Mauro Cappelletti and John Adams were of the opinion that "they have been trained in the execution of the law as it stands, and they tend to shy away from the type of

18. See the table II in ABRAHAM, *supra* note 16, at 45-47.

19. Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PENN. L. REV. 781-795 (1957).

20. ABRAHAM, *supra* note 16, at 52.

policy-making decisions that are involved in judicial review."²¹ In view of the inevitable political character of the judicial review, it is wise that a constitutional court not only be composed of jurists, but also of statesmen. This has certainly been true of United States Supreme Court justices, who, except for Justice George Shiras, Jr. (1892-1903), have engaged in at least some public service at various levels of government.²²

Another difference from the American system of judicial review is that the term of service for the Chinese Grand Justices is fixed at nine years.²³ Having learned from the sharp conflict between the United States Supreme Court and President Roosevelt in the 1930's, most justices of constitutional court justices have been subject to reappointment after a period of time. Since 1967 all fifteen Italian Justices hold office for nine years.²⁴ After 1970, service on the Federal Constitutional Court of West Germany has been restricted to a single twelve-year term.²⁵ Civil law countries have felt that life tenure might lead to carelessness in the performance of a court member's job or to his loss of contact with the life of the country. However, the advantages of a limited term seem more than outweighed by the resulting jeopardy to the judges' independence. This potential for political abuse has been somewhat moderated as most of the Chinese Grand Justices have been customarily re-elected.²⁶ In this connection, it is noted that until recently Justices in both West Germany and Italy were not prohibited by law from seeking re-election.²⁷ This is

21. Cappelletti & Adams, *Judicial Review of Legislation: European Antecedents and Adaption*, 79 HARV. L. REV. 1207, 1215 (1966).

22. ABRAHAM, *supra* note 16, at 52.

23. Article 5 of the Organic Law of the Judicial Yuan.

24. See Flanz & Figliola, Italy, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 26 (1973).

25. Before that, those drawn from the bench still enjoyed life tenure until they reached the compulsory retirement age of sixty-eight; other members of the Court were chosen for an eight-year term but were eligible for re-election.

26. Because of the lack of available information, the author cannot find out the reason for those who failed to be nominated. However, except in two cases, all of those Grand Justices were seventy or more years old when their original term expired. The advanced age may have played a significant role in preventing them from seeking re-election.

27. CONST. art. 135, para. 3 (Italy); Constitutional Court Act, art. 3 para. 4 (West Germany). There was also a proposal to eliminate the possibility of re-election during the debate of drafting the Law Governing the Council of Grand Justice in 1957; see LI-FA-YUAN-KUAN-PAO (Gazette of the Legislative Yuan), 20th., 4st sess. 50-58; 5th sess. 105-6 (1957). However, it failed to be adopted.

probably a solution to the inherent defects of the fixed tenure, though stability and consistency may not be adequately guaranteed.

From the establishment of the Council in 1948 up to 1978 there have been sixty-one Grand Justices. Twenty-seven belonged to the first term, seventeen to the second term, twenty-one to the third term, and fifteen to the current fourth term, which began on September 28, 1976. The reader must wonder about these four seemingly magic numbers, which do not correspond to the required seventeen Grand Justices. A brief history is needed. At the time of its inauguration, only twelve Grand Justices had been duly appointed. The other five candidates had not been confirmed by the Control Yuan. Moreover, two of them also declined their nomination. After another Grand Justice died, eight more nominations were submitted to the Control Yuan, and all of them were confirmed. Since the civil war had already spread throughout the country, the Grand Justices simply could not get seriously down to work. After the National Government moved to Taiwan, only two of them reported for duty.²⁸ In March 1952, seven new members were added. With the original two appointed, they constituted a quorum and began to function.

When their term expired in July 1958, fifteen new Grand Justices were appointed in September. As two of them died before the expiration of their term, new ones were added. The third term began on October 2, 1967 also with fifteen Grand Justices. As a result of death, withdrawal from duty, and transfer to other public service, six men and a woman were appointed.

From the preceding historical survey we may conclude that the Grand Justices in the first term were most numerous but least organized. Only nine of them had really worked together for a period of seven years. The following question naturally arises. Why did the President in all but the first term nominate fewer Grand Justices than the number provided? The probable answer is that these two seats have been reserved for the members of two other minority parties, the Young China Party and the Chinese Democratic Socialist

28. They were Hu Pao-ao and Su Shih-hsing. An inquiry was made of the whereabouts of the Grand Justices. It was found that one had been transferred to a cabinet post, one had resigned, four had died, and one had gone over to the Communist regime, while the whereabouts of others were simply unknown; see CHINA HANDBOOK 81 (1953-54).

Party,²⁹ and we do not know whether they have ever attempted to provide any names for consideration to the President.

At the time of their appointment, twenty of those sixty-one Grand Justices were justices of the Supreme Court and were thereby under the section one authorization, and seventeen were professors of law and were appointed according to section three. In addition, seventeen were actively involved in politics, five were highly regarded authors who were the second part of the fourth section appointees and four were section two's legislators. Only those who would qualify as Grand Justices under the first half of section four, which provides for persons having been a justice of the International Court, have never been appointed.³⁰

A superficial analysis concludes that justices, law professors, and politicians were the major components. However, a close analysis produces a somewhat different picture. Although there were eight Grand Justices in the first term belonging to section five appointees, their numbers were reduced to six in both the second and the third term and, most of all, only one of the current fourth term members belongs to this group. Therefore, the influence of politicians has been reduced drastically recently. On the other hand, forty Grand Justices had engaged in some kind of public service in their previous career before their appointment to the Council, although such public service had not constituted a major part of their careers. It is worth mentioning that not a few of them are serving in the current term. Their impressive number supports our early contention that involvement in public service is helpful to some extent in the career development of judges and professors.

Only one Grand Justice in the first term was selected under the second part of the section four. Not until midway into the third term did another Grand Justice come to the council holding the same qualification. Three persons in the current term were nominated under this section. Because authors of books on law are generally also professors of law, the total number of such members therefore reaches

29. For detailed information about these two parties, see T. CH'EN, *THE GOVERNMENT AND POLICIES OF CHINA*, at 351-55 (1967). The former currently has 64 representatives in the National Assembly, 12 in the Legislative Yuan and 4 in the Control Yuan. The latter has 37 members in the National Assembly, 6 in the Legislative Yuan, and 3 in the Control Yuan. Data provided in *CHINA YEARBOOK* 70, 72 (1977).

30. Two Grand Justices, Ju-ao Mai and Che-chun Hsiang, had served as judge and prosecutor respectively in the International Military Trial Tribunal for the Far East (IMTFE) at Tokyo after World War II, but both were nominated under section three.

eight in the current term. This, combined with the established fact that professors of law have steadily occupied, along with the justices of the Supreme Court, ten or more seats within the Council in the past terms, proves that the major source of the Council has been greatly limited to the university and the bench. Further, the former group has had more recent appointments to the Council than the latter. This reflects a long-recognized practice in civil law countries to look toward the universities in making high judicial appointments because only the scholar is a real protagonist of the civil law tradition. Paraphrasing the oft-quoted notion that common law is a law of the judges, the civil law is a law of the professors.

It is also relevant to note that most countries limit the activities of the justices of the constitutional court during their term. This practice differs from that in the United States, which has no provision against its members involving themselves in extra judicial functions. A few justices in the United States have played politics while performing judicial functions, some having even sought the Presidency.³¹ In most other countries, a justice is only permitted to teach during his term. Those professors whose selection to the court has been based on their teaching frequently continuing their former professions during their court tenure. This inclination toward teaching has also been exercised by jurists selected from other categories. Usually they are well received by the universities. In addition to the unusual prestige enjoyed by the law professor in civil law countries, a practical consideration can also be discerned. Since justices' terms are fixed, there exists a distinct possibility of unemployment after the expiration of judicial tenure. Therefore, the impetus to retain a more permanent professional post as insurance for the future is understandable. The members of the Council of Grand Justices are also restricted in their extra judicial work to teaching, even though there is no express prohibition against other kinds of activities.

After examining the qualifications for candidacy to the constitutional court, we now tackle the recruitment process. Nowhere is the relationship between the political and judicial systems more casual than in the selection of justices for constitutional adjudication. The

31. Mr. Justice McLean had sought a presidential nomination five times, and Mr. Justice Hughes did become the presidential candidate in 1916. Other recent examples were Justices Roberts' service on the Pearl Harbor investigation, Jackson's tour as prosecutor at Nuremberg, and Chief Justice Warren's reluctant chairmanship of the Commission on the Assassination of President Kennedy.

only provision of the Chinese Constitution relating to judicial recruitment is article 79, which, like its American counterpart, specifies simply that Grand Justices shall be nominated with the consent of the Control Yuan.

We will not discuss the method chosen to select candidates for the Council in its first term, in part because the Council was in a rather unstable condition and in part because relevant material is simply not available. During the other three terms of the Council, an informal method was followed for the selection of candidates. First, an advisory committee was established. It was chaired by the Vice-President and consisted of the secretary-generals of the Office of the President, National Security Council and Kuomintang, and the President of the Judicial Yuan. After it began its work, each member would submit a list of candidates recommended by a variety of outside groups or by the individual himself. Then the most important principles of recruitment were decided. The most recent principles included five guidelines: a candidate must be under seventy-five when his term expires; not less than a third and no more than one-half of its present members can be re-elected; except for Taiwan and Fukien, other provinces may have no more than one Grand Justice; there must be two women candidates; and party affiliation is not necessary.³² Fifteen candidates would then be produced under these guidelines and submitted to the President for nomination. Besides the five rejections in the first term, the candidates have always been confirmed by the Control Yuan.

In the supplementary selection of Grand Justices, occasioned by death or departure for other reasons, no advisory committee was needed. It was the sole responsibility of the President of the Judicial Yuan to propose the successor and report to the President.³³ Of course, he had to consult with other departments before he finalized the list.

The party plays a significant role in the whole recruiting process. Not only is its secretary-general a member in the advisory committee, but he works with the members of the Control Yuan to secure the necessary confirmation. In view of the fact that the Kuomintang has controlled the political power and has been the only major party in the Republic of China for such a long period, its influence can hardly be disputed. Although the American political parties do not occupy as important a position as that of the Kuomintang, the Presidents of the

32. LIEN-HO-PAO (United Daily News), May 3, 1976.

33. Liu, *The Function of Interpretation of Constitution Practiced by the Council of Grand Justices*, 3 HSIEN-CHENG-SHIH-TAI (Constitutional Review) 1:33. 41 (1977).

United States have often made the most of their Supreme Court selections by nominating members of their own political party. However, it is interesting to note that nine Republican Presidents and three Democratic Presidents have chosen at least one justice of the opposing party.³⁴ In fact, except for the Kennedy and Johnson administrations, since the 1930's all the Presidents have followed the practice. This also applies to the Chinese Council of Grand Justices. In each of the four terms at least one member was included who did not belong to the Kuomintang.

The principle of geographic balance has also been influential. Twenty-one of the total thirty-five provinces have produced at least one Grand Justice. The ratio can be compared with thirty-one out of the fifty states in the case of the United States.³⁵ Since the actual controlled area has been limited to Taiwan and several off-shore islands along the Fukien province, natives of Taiwan have occupied more seats than others, and this trend has been more obvious in the most recent term. This coincides with the overall increase in the recruitment of native Taiwanese into all branches of the government.

Often a concern for geographical balance is coupled with a desire for religious representation in considering a nominee to the Supreme Court. Since the Chinese traditionally tolerate different religions and a so-called "religious war" has never occurred in Chinese history, the de-emphasis of religion in the political process in general and in the recruitment of Grand Justices in particular is not surprising.

Moreover, women have been in the Council since 1967, and there even been two female Grand Justices in this term. In this respect, the Chinese record is better than the Americans' with the heretofore all male Supreme Court.³⁶

We have already seen that one possible criterion for the position of Grand Justice in the Council is at least ten years' experience on the bench or at a university. In the case of members of the judiciary, their promotions are strictly limited according to the career system hierarchy. Moreover, the Council has become the top rung of judicial career ladders. Accordingly, the average age of appointment of the judiciary to the Council has been relatively high. The same is true of

34. ABRAHAM, *supra* note 16, at 58-60.

35. However, no President has apparently considered himself absolutely bound by this factor. Its major purpose lies in political considerations.

36. The first woman Grand Justice was Chin-lan Chiang, appointed under the first section. In other words, she has been in the Supreme Court for over ten years. Hsin-hsiang Fan and Ch'iang-wei Chiang are the two now serving in the Council. Both of them were Supreme Court Judges before becoming Grand Justices.

those appointed politicians who reach prominence through the bureaucratic hierarchy. Maybe this can be explained in part by the Chinese culture's emphasis on seniority and the fact that in China age is given status. Nevertheless, on the whole, the general average age at appointment was below sixty — 58.6. It is relevant to indicate that this average age has been deliberately reduced from 59.1 in the first term to the 57.4 in the current term, and even four professors in their mid-forties have been nominated. If the trend continues, the Council may become more active, energetic, and aggressive, all of which is desperately needed to circumvent the Council's rigid procedural restrictions and to raise the Council's status while promoting constitutionalism in the Republic of China.

C. Jurisdiction

After detailing the composition of the Council of Grand Justices, we can now proceed with the other side of the picture, the parties. Who is best qualified to represent the interests involved in determining the validity or invalidity of the governmental act? The answer is not a simple one and, like other aspects of the judicial review system, the practice in the civil law countries runs counter to that of the American. In the United States, the question of a law's constitutionality can only be placed before the court as a part of a concrete case or controversy, and thus only the party to a law suit may raise constitutional issues. This approach is defended on the ground that a party who has a direct interest in the outcome is in the best position to contest a questionable statute. It is said that under this system the proceedings are more lively and more assiduously contested, and that the court is less apt to overlook significant issues.³⁷

On the other hand, individuals may not always be able to institute judicial review because of lack of money, time, energy, or because they simply do not have a genuine legal interest to enter into the legal process. It is possible that a decade or more may pass before a plaintiff is found. Dissatisfied with the somewhat haphazard system of incidental control, the constitutions of some civil law countries designate a limited number of public authorities as parties who may raise the issue of unconstitutionality.

The Chinese Constitution has no clause corresponding to article III, section 2, paragraph 1 of the United States Constitution, which limits the jurisdiction of the federal courts specifically to a "case or

37. Grant, *Judicial Control of Legislation*, 3 AM. J. COMP. L. 186, 198 (1954).

controversy." Thus, legislation regulating the jurisdiction of the Council of Grand Justices was drafted in 1957. Before its appearance, a "Rules of Order" consisting of twenty-one articles which set forth in detail the scope of interpretation, the quorum of the meeting, the manner of voting, etc. had been enforced.³⁸ Since the Rules of Order were initiated and adopted by the Council itself without going through the legislative process, they were decried for a long time. The unfriendly attitude grew into a vehement attack on the Council as a result of Interpretation No. 76, which we will deal with in detail in the next chapter. Opponents, especially the legislators, decided to write a new law clarifying the jurisdiction and procedure of the Council.

Article 3 of the Law Governing the Council of Grand Justices (hereinafter cited as Governing Law) provides:

As to the interpretation of Constitution, the Council of Grand Justices is authorized to exercise the following: 1. to clear up doubts and problems arising from application of the Constitution; 2. to determine and explain whether a law is in conflict with the Constitution; 3. to determine and explain whether the statutes for self-government of provinces and counties and the laws and regulations promulgated by provincial governments are in conflict with the Constitution.

Except for provincial self-governmental law, which is the only type of statute that must be submitted by the province to the Judicial Yuan immediately after its enactment to determine its constitutionality,³⁹ the remaining functions have to be exercised upon the receipt of an application for interpretation. Both governmental organs and the people have the right to apply for constitutional adjudication. The inclusion of the people is significant, particularly because the "Rules of Order" allowed only a government agency to bring an application. Under that system, the deficiency in protecting individual civil liberties had long been recognized. However, it was only after considerable parliamentary debate that the individual won the right to file a constitutional complaint directly with the Council of Grand Justices.⁴⁰

38. CHINA HANDBOOK 82 (1951).

39. CONST. art. 114.

40. Almost half of the debate centered on this subject; see LI-FA-YUAN-KUAN-PAO (Gazette of Legislative Yuan), 21st, 12, 14, 16th Sess.

As the requirement of "case or controversy" need not be satisfied, this direct review procedure should have expanded the actual scope of constitutional review beyond that available in the United States. However, accessibility to the Council has not been easy because of rather strict procedural barriers. Only under the following three conditions may a central or local governmental agency apply to the Council: (1) when a question is encountered by it in applying a provision of the Constitution while performing its duties; (2) when a dispute arises between governmental agencies with regard to the application of a provision of the Constitution in conducting their official business; or (3) when a question is raised as to whether an application of certain law or an administrative ordinance is in conflict with the Constitution when it is applied. In short, standing can only be granted after a governmental organ performs its business in applying a provision of the Constitution or a particular statute or ordinance. It may not raise a constitutional issue freely without performing its duty first and this issue must be within its legitimate jurisdiction.

According to the preceding second condition, it seems that the Council is the sole arbiter of disputes between units of government concerning their respective rights and duties under the Constitution. The Council is not, however, authorized to resolve all controversies between organs. Only when the interpretation of the Constitution is definitely required does it enter. Even so, this is an entirely unfamiliar system to the American jurist, even though most of the constitutional courts in civil law countries have the same kind of jurisdiction. The doctrine of the "political question" has not been transferred outside the United States' boundaries. The main purpose of this provision is to require that the government agency maintain its continuing public duty to guard the constitutional order. Sometimes this method may have the benefit of cooling off a heated political struggle for power by limiting it to a mere legal controversy. On the other hand, it may involve the Council in a political battleground which it would be best to avoid, particularly if the political departments fulfill their own duties to search for a political compromise within the limits of the Constitution. This system of so-called "judicialization," which inevitably places the Council of Grand Justices or other constitutional courts in dangerous, embarrassing and perhaps unrealistic positions to settle by judicial procedure a

conflict of power between high constitutional organs, has been a disputed subject, notably in West Germany.⁴¹

The potential risk involved in the efforts to settle political conflicts by the Council of Grand Justices has been eased to a large extent by the article 44 of the Chinese Constitution. In the event of a dispute among the various Yuans, article 44 authorizes the President to call a meeting of the Presidents of the Yuans concerned for consultation on a solution. Therefore, the various Yuans are not required to file an application with the Council even for disputes related to constitutional interpretation. Those disputes may still be resolved in the political arena. Theoretically, the application of the Constitution is prior to the legislative statute as a result of the doctrine of the hierarchy of law. Therefore, the legal means of resolving governmental conflicts between Yuans under the Governing Law must give way to the political solution directly provided by the Constitution.

However, only conflicts between Yuans are within the scope of article 44. Does this imply that other disputes among lower levels are to be resolved in the Council? If the answer is affirmative, the Council would be implicated in numerous conflicts between government agencies. However, according to article 8 of the Governing Law, the application of a subordinate government agency to the Council may only be made through its superior agency. This provision substantially reduces the number of government applications. Before article 8 was enacted in 1957, the same provision in the former "Rule of Order" applied both to constitutional interpretation and to uniform interpretation of laws or ordinances, the other function of the Council. From the legislative history of the Governing Law, however, it appears that article 8 was intended to apply only to the function of uniform interpretation of laws or ordinances.⁴² Hence it would appear that subordinate agencies have direct standing to apply for a ruling as to constitutionality.

41. A. HEIDENHEIMER, *THE GOVERNMENTS OF GERMANY* 151 (1966); Loewenstein, *JUSTICE IN GOVERNING POSTWARD GERMANY* 236, 262 (R. Litchfield ed. 1953).

42. According to the arranged order of the articles, article 8 follows immediately after the provision concerning the uniform interpretation. This might be taken as evidence for its limited application. The major supporting evidence, however, was the statement made by Tung Huang in the plenary session of the Legislative Yuan. He was the major figure in the Committee of Judicial Affairs which had drafted the law that later was accepted by the Legislative Yuan. See LI-FA-YUAN-KUAN-PAO (*Gazette of the Legislative Yuan*), 21st., 14th Sess. at 23.

Nevertheless, the existing practice is for subordinate government units to act through their superior agencies in seeking a constitutional interpretation.⁴³ Also, in order to maintain a sound hierarchy of administrative supervision within the administrative system and to manage their relatively large numbers, it may be deemed desirable to prohibit the initiation of constitutional adjudication by subordinate agencies.

In West Germany, this right is also not universally available to every government agency. "Administrative agencies, government corporations, churches, or other corporate bodies with quasi-public status" were among the disqualified.⁴⁴ However, parliamentary parties and even political parties outside parliament in West Germany in certain circumstances have standing in the Federal Constitutional Court. This is a rather brilliant device because a legislator and a minority political party in general are more aggressive than a government agency which employs people of career service.

Although China did not adopt a system of federation, a delimitation of powers between the central and provincial governments is not easy to achieve. The Constitution has attempted to provide a clear boundary between the central and province,⁴⁵ but it is not safe to say that disputes will never arise. Since the Governing Law first provided that both the central and local government agency would be qualified to apply for interpretations and that the jurisdiction of the Council of Grand Justices would include "disputes between government agencies"⁴⁶ without a specific limitation to central agencies, the settlement of conflicts between the central and local government originating from the division of powers between them under the Constitution must be within the jurisdiction of the Council. Accordingly, both state and local laws may be challenged directly before the Council by a province or a central government agency,

43. Interpretation No. 99 was the only exception. It was made by the Central Bank of China, which is under the administrative control of the Office of the President. Considering that the Council is under the control of Judicial Yuan and that the status of the President is above the five Yuans, the filing of the application by the Bank itself is not hard to understand. Nevertheless, one reason for the dissenting opinion in this case was this procedural fault; see SZU-FA-YUAN TA-FA-KUAN HUI-I CHIEH-SHIH-HUT-PIEN (The Collection of Interpretations Made by the Council of Grand Justices of the Judicial Yuan) 182 (1977).

44. D. KOMMERS, JUDICIAL POLITICS IN WEST GERMANY 105 (1976).

45. Articles 107-111.

46. Article 4.

respectively, whenever a province deems that a law or an act having the force of law of the state invades the sphere of authority attributed to it by the Constitution, or whenever, on the other hand, the central government regards a local law as having exceeded its authority.

Oddly enough, however, the Legislative Yuan has been vested by the Constitution with authority to settle disputes between central and local governments.⁴⁷ The reason for such a novel arrangement has long puzzled students of the Chinese constitution. How can a legislative body with four hundred members, already burdened with unceasing legislative work, devote the time necessary for the solution of these delicate problems? Before the promulgation of the Constitution, the Legislative Yuan had never been entrusted with this duty. Although the Legislative Yuan occasionally scrutinized provincial enactments and regulations during the period of political tutelage, it did not maintain the authority to interpret them when it found they were in conflict with those of the central government, but rather submitted the point or points of issue to the Judicial Yuan.⁴⁸ This present arrangement needs to be amended.

One of the most important functions of the Council is to decide upon the constitutionality of both local and national legislation. Three avenues are open for referring issues of constitutionality to the Council. First, the central or local government can ask the Council to determine whether a national or local statute is consistent with the Constitution, or whether a local law is consistent with other national law. The standing of a central or local government agency in this respect does not differ much from the above-mentioned case of constitutional controversies. It is worth mentioning, by way of contrast, that in West Germany one-third of the members of the Bundestag, the lower house of parliament, also can initiate such a procedure.

Greater significance lies in the second and third avenues. Since the Governing Law only provided for standing for a "central or local government agency," the different levels of the regular courts appeared to fall within the standing requirements. However, in practice this only meant that regular courts could certify a question with respect to the constitutionality of a controlling statute to the Council when such a question arose in the course of litigation and was necessary to the resolution of the case. As early as Interpretation No. 9, which was rendered on October 27, 1952, the Council had declared that if there was anything in a judgment that did not

47. Article 111.

conform to the Constitution, a party could point this out on appeal. A party was permitted to argue that a particular statute or administrative act relied upon by the court's judgment was in violation of the Constitution. However, the judge was not bound by the allegation; he had complete discretion to decide whether there was any doubt on constitutional grounds about the validity of a national or local law governing a case.

Once a question of constitutionality is referred to the Council, are the court proceedings suspended until the decision of the Council? In Italy and West Germany, whose constitutional review has been regarded as the model for the other civil law countries, the answer is affirmative.⁴⁹ Since neither Chinese constitutional scholarship nor actual Chinese practice has as yet provided an answer, these European examples are highly relevant.

As each court exercises its judicial function independently, it seems unnecessary to discuss the necessity of requiring the lower courts to go through the higher courts to certify a constitutional question. There have been only two cases referred by a regular court and they were either submitted by the Supreme Court or the Administrative Court,⁵⁰ each of which is the highest organ in its judicial hierarchy.⁵¹ There was no indication in these applications that the questions referred had originated in the lower courts. Another case is relevant here because its original application was in the district court, the bottom level of the judiciary, and it went through all the intermediary superior courts, the Higher Court, and the Ministry of Justice, until finally it was the Executive Yuan that brought the application.⁵² Since the data collected so far are scarce, any conclusion is far from complete.

Since every judge in Italy and West Germany is in a position to undertake an examination of the constitutionality of a statute in a concrete case, the practical differences from American judges are not so great. As the famous comparative constitutional law scholar, Mauro Cappelletti, has remarked succinctly, "It is not the case for Italy and Germany (as it is in the United States) that the judges are

48. For detail, see TSAO, *supra* note 7, at 220.

49. Cappelletti & Adams, *supra* note 21, at 1220-21.

50. Interpretation Nos. 47, 89.

51. This in fact resembles the Austrian practice because only the two Supreme Courts in Austria, one for civil and penal law, the other for cases involving administrative law, have the power to raise constitutional questions before the Constitutional Court.

52. Interpretation No. 37.

competent to *perform* the function of judicial review. However, they all at least have the right to *require* the Constitutional Court to exercise its powers of review."⁵³

Some American jurists may have serious doubts about this arrangement of the Constitutional Court because they may think that a constitutional issue cannot be decided abstractly without having the benefit of the facts.⁵⁴ Some may also claim that as a result of the separation of constitutional questions from specific factual situations, the constitutional court may be forced to decide questions that would be better postponed.⁵⁵ However, a close examination reveals that these arguments do not always prove to be true. In practice, the strict separation of a constitutional question from a factual setting can hardly be achieved. It is usual for the Constitutional Court to take note of the facts in the case. Parties to the original proceeding may be required to file briefs and sometimes even offer oral arguments in the proceedings before the Constitutional Court. On the other side, according to Donald Kommers, a specialist in West Germany's Federal Constitutional Court, the system prevailing in the civil law nations has an advantage, that is, "the Court's opportunity to make policy is accordingly limited by the willingness of state and federal judges to deliver constitutional questions to the Court's keeping."⁵⁶

In addition to references from national or local government agencies the Council of Grand Justices may also receive petitions for relief from individuals who maintain that their constitutional rights have been violated. The objects of such complaints may include an act of the executive power, an administrative act, a judicial decision, or even the statute itself. Therefore, it is possible that, after a judge decides not to raise the question of constitutionality in the regular suit, the individual litigant may file with the Council if he is convinced that he has been deprived of a basic right given him by the Constitution. This represents a great advance in the protection of civil liberties.⁵⁷

As was the case in West Germany, the debate over granting standing to an individual was heated. The proponents argued that

53. CAPPELLETTI, *supra* note 13, at 75 (1971).

54. Freund, *A Supreme Court in Federation*, 53 COLUM. L. REV. 597, 617 (1953).

55. CAPPELLETTI, *supra* note 13, at 80.

56. D. Kommers, *The Federal Constitutional Court in the West German Political System*, in FRONTIERS OF JUDICIAL RESEARCH 73, 78 (J. Grossman & J. Tanenhaus ed. 1969).

57. It is worth pointing out that both Austria and Italy until now have not allowed individuals to file with their Constitutional Courts.

public authorities cannot always be relied upon to protect private rights with sufficient vigor. Only the individual who suffers loss of liberty can be expected to defend his right with great zeal, with the result that the issues in dispute might be better articulated and resolved. Furthermore, such individual standing could serve as a constant alert to public officials not to overstep their authority. The special dignity derived from this basic freedom in the Constitution would thus be stressed and elevated. Not a few opponents, inside and outside the Legislative Yuan, however, argued that this procedure would heavily burden the Council and would further worsen the problem of prolonging litigation. The Council might become the "super revision" court, and the administration of justice would be dangerously disrupted.⁵⁸

In the end, success belonged to the proponents. Along with the promulgation of the Governing Law in 1957, the right of the individual to sue the government on constitutional grounds became a reality. However, several procedural limitations simultaneously were imposed upon this individual right. Standing to challenge the constitutionality of a statute or administrative act is conferred only upon persons whose material or moral interests, as defined expressly or implicitly in the constitution,⁵⁹ are wronged. This requirement is similar to the "standing to litigate" prerequisite in United States constitutional law.⁶⁰ Also, the exhaustion of previous legal remedies before appealing to the Council is mandatory. This means that, in the case of a petition based on a judicial decision, the petitioner must have exhausted all regular avenues of review before bringing the case to the Council. If the petition involves the actions of administrative officials and if administrative remedies are available, these too must be exhausted before resort to the Council can be successful.

58. See LI-FA-YUAN-KUAN-PAO (Gazette of the Legislative Yuan), *supra* note 42.

59. Articles 7 to 18 of the Constitution specifically enumerate the civil rights such as the freedom of speech, correspondence, assembly and association, equality before the law, etc. As article 22 spells out, "All other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution"; hence constitutional protection should be extended beyond those enumerated rights and liberties provided in the Constitution.

60. H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 156-92 (1953).

D. Proceeding

After the promulgation of the Governing Law in 1957, the "Rules of Order" ceased to exist. However, the precedent of drafting its own internal rules has been followed by the Council and agreed to by the Legislative Yuan. A new "Rules Concerning the Conduct of Business by the Council of Grand Justices" [hereinafter referred to as Rules] was created and has applied ever since.⁶¹ All appeals to the Council must first go to a petty bench of three Grand Justices. After examining the arguments, the petty bench might decide to recommend refusing the application. In such a case it would make a simple report to the Grand Bench (which includes all the Grand Justices with the President of the Judicial Yuan *ex officio*) to refuse the appeal. On the other hand, it might prepare a rather detailed statement of the relevant facts and issues for the deliberation of the Reviewing Bench (which differs from the Grand Bench by excluding the President of the Judicial Yuan) when its suggestion of acceptance is confirmed by the Grand Bench. The reason for establishing a Reviewing Bench is to circumvent the Grand Bench which according to the Governing Law is chaired by the President of the Judicial Yuan or the Vice-President if the former is absent.⁶² These officials do not necessarily have the qualifications required of the Grand Justices, even though the procedure of nomination and confirmation are the same, and they may only preside at the meeting without the right to argument and vote.⁶³ All substantive matters are reserved for the Reviewing Bench, and the Grand Bench only serves as a rubber stamp, a formality.

The Grand Justice on duty for the month is responsible for calling the Reviewing Bench, which then elects one of the fellow Grand Justices as chairman. This presents a stark contrast to the United States Supreme Court, where any period under the leadership of a particular Chief Justice has customarily been marked by his

61. The legality of drafting the internal rule by the Council itself was challenged by a current member, Jui-kuan Yao, in his critical article, *A Study on Some Problems Related to the Function of the Council of Grand Justices*, 3 HSIEN-CHENG-SHIH-TAI (Constitutional Review) 3:51 (1978).

62. Governing Law, art. 15.

63. Response made by the Kuan-sheng Hsieh, President of the Judicial Yuan, to the inquiry of the members of Judicial Affairs Committee, Control Yuan; see HSIN SUN PAO (Newborn Daily News), May 10, 1951).

name.⁶⁴ The Chinese arrangement of course is cumbersome and should be revised in the future.⁶⁵

In West Germany, cases are allocated to the justices on the basis of their particular interests and specializations except for those that are related to a constitutional complaint initiated by the individual. In China, the allocation of application to each petty bench is based upon rotation, and the assignment of Grand Justices to the petty bench is made by lot, the only condition being that each member must belong to a different nominating category.⁶⁶ The decision to require all the Grand Justices to handle every kind of case was received by many of them with mixed feelings. However, since three members are involved as a collegiate unit for a single case, the possible deficiency of any Grand Justice has been significantly corrected. Furthermore, one or more Grand Justices who have the expertise to deal with the particular kind of case may be additionally assigned to the unit for the purpose of drafting the opinion of the Council.⁶⁷

While the decision in the Council when dealing with the uniform interpretation of statutes or administrative ordinances is made by a simple majority, three-fourths of the total number of Grand Justices are required for a quorum and at least three-fourths of them must concur before a decision of constitutionality is made.⁶⁸ In other words, without the attendance of three-fourths of the members, no decision at all can be rendered. This special majority rule was a reaction to the previous practice in which only a simple majority was sufficient for

64. Among them, Marshall, Hughes, and Warren have received the most attention; see, e.g., J. OSTER, *THE POLITICAL AND ECONOMIC DOCTRINES OF JOHN MARSHALL* (1914); J. CUNEO, *JOHN MARSHALL, JUDICIAL STATESMAN* (1975); D. DANIELSKI & J. TULCHIN, *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* (1973); S. HENDEL, *CHARLES EVANS HUGHES AND THE SUPREME COURT* (1951); L. KATCHER, *EARL WARREN: A POLITICAL BIOGRAPHY* (1967); J. WEAVER, *WARREN, THE MAN, THE COURT, THE ERA* (1974).

65. The lack of a significant role as to the chief justice also can be found in Japan as well as West Germany; see Itoh, *Judicial Decision-Making in the Japanese Supreme Court*, 3 *LAW IN JAPAN* 128, 151 (1969); Kommers, *supra* note 56, at 81.

66. Rules, art. 5.

67. *Id.*, art. 3.

68. Governing Law, art. 13. This can be compared with the Japanese practice in which more than eight of the fifteen justices are needed to declare a statute unconstitutional; see Wada, *The Supreme Court of Japan as Adjudicating Agency and its Functions*, 23 *JAHRBUCH DES OFFENTLICHEN RECHT DER GEGENWART* 537, 541 (1974). Cases involving impeachments, forfeiture of basic rights, and the constitutionality of political parties in the West German Federal Constitutional Court also require a two-thirds majority; see Kommers, *supra* note 56, at 82.

questions of constitutionality. This was later amended so that two-thirds of the Grand Justices residing at the seat of the central government had to be present and a majority of the total number had to be in agreement,⁶⁹ in order to meet the special circumstances after 1949.

In view of the serious consequences caused by a judgment of unconstitutionality, raising the number of the required majority seems reasonable. Nevertheless, when we consider that this rule is stringent even in comparison with the amendment procedure of the Constitution,⁷⁰ it appears excessive and may even cause undesirable results. It is not difficult to appreciate that the larger the majority required, the smaller is the minority that can veto the adjudication of the majority of the court. In other words, in order to determine whether a statute or ordinance is constitutional, at least thirteen members must be present and at least ten members must concur. In view of the prevalent practice of only nominating fifteen Grand Justices, the quorum required for the passing of the decision is twelve. Because the current members of Grand Justices number is fourteen, attendance of eleven members is required.⁷¹ Accordingly, any four Grand Justices of the Council may form a bloc to effectively prevent the exercise of the Council's function of constitutional interpretation. This gives minority members disproportionate bargaining leverage in constitutional deliberations and has contributed to a large extent to the scarcity of constitutional decisions rendered by the Council during the past twenty years.⁷²

The conference of the Reviewing Bench is the second step of the decision-making process. It is normally held on every Friday morn-

69. Rules of Order, art. 12.

70. Article 174 of the Constitution provides two procedures: (1) Upon the proposal of one-fifth of the total number of the National Assembly and by a resolution of three-fourths of the delegates present at a meeting having a quorum of two-thirds of the entire Assembly; (2) upon the proposal of one-fourth of the members of the Legislative Yuan and by a resolution of three-fourths of the members present at a meeting having a quorum of three-fourths of the members of the Yuan, an amendment may be drawn up and submitted to the National Assembly by way of referendum.

71. Professor Chien-han Chiang, chairman of the Political Science Department at National Taiwan University, was nominated and confirmed. But given the strong opposition during his confirmation due to his co-authoring of a book criticizing the Control Yuan, he withdrew from the Council; CHUNG YANG JIH PAO (Central Daily News), Oct. 3, 1976.

72. See C. LIN, CHUNG-HUA-MING-KUO HSIEN-FA CHU-TIAO SHIH-YI (A Detailed Study of Articles of the Chinese Constitution) 79-80 (1975); Tong, *The Research on Making the Interpretation of Constitutional System of our Nation*, 2 HSIEN-CHENG-SHIH-TAI (Constitutional Review) 4:52, 54 (1977).

ing.⁷³ Five days before it convenes, a report prepared by the responsible petty bench has to be circulated among the Grand Justices.⁷⁴ At the conference, members of this petty bench summarize the case and state reasons for their recommendation. Then they entertain questions and comments. Discussion is usually informal. Unlike the practice of the United States Supreme Court in which the Chief Justice always has the privilege of "speaking first" and "voting last" and where seniority is the controlling rule of order for the other members, there is no prescribed order regarding speaking and voting. Since the case is discussed quite freely by the Grand Justices without special order or limitation of time, this practice may lead to the wasting of time and energy. When there is a large backlog of pending cases, it becomes quite impractical. On the other hand, free and informal discussion may contribute greatly to the polishing of the decision and to the attainment of a greater majority.

After the underlying principle on which the decision is to be based has been determined at the conference, the case will be referred back to the original petty bench, which, along with one or more other Grand Justices assigned by the Council, will write the opinion of the Council.⁷⁵ Therefore, in this respect, the rigidity of assignment in China also differs from the comparative flexibility in the United States Supreme Court.⁷⁶

After the opinion is completed, it is again submitted to the conference of the Reviewing Bench for further pruning, qualification, deletion, and amendment until a satisfactory result is achieved. Also, five days' prior notice is required in which to circulate the drafted opinion before the conference.⁷⁷ During the whole process, neither the drafting assignment nor the judicial vote may be disclosed to the public. Also, the nature of the deliberations within the Council is kept strictly secret.⁷⁸ This last provision is not hard to understand because

73. Interview with Grand Justice Yu po Cheng.

74. Rules, art. 6.

75. This rule also appears in the practice of the West German Federal Constitutional Court; see KOMMERS, *supra* note 44, at 176, and Japanese Supreme Court; see Wada, *supra* note 68, at 541.

76. If the Chief Justice is in the majority, he of course can write the opinion of the Court himself or designate others. When he is on the minority side, it is the senior Associate Justice on the majority who chooses either himself or assigns another member to write the opinion. Nevertheless, there also have been some methods used in the assignment process; see H. ABRAHAM, JUDICIAL PROCESS 205-11 (1975); D. ROHDE & H. SPAETH, SUPREME COURT DECISION MAKING 172-87 (1976).

77. Rules, art. 6.

78. *Id.*, art. 12.

the same practice applies to any country's court whether or not it deals with a constitutional question. As Mr. Justice Frankfurter once observed, "That the Supreme Court should not be amenable to the forces of publicity to which the Executive and the Congress are subjected is essential to the effective functioning of the Court."⁷⁹

However, when we examine the legislative history of the Governing Law, it may appear that the intent of the legislative Yuan was the opposite, to maintain a public conference. The original draft of the Governing Law in this regard contained a provision that "The Council may hold secret meetings when it deems necessary." This implied that public meetings should be the rule. Although this provision was deleted in the final draft, the reason was that there was simply no ground to justify the existence of the secret meeting.⁸⁰ The legislative history clearly reveals the confusion on the part of the legislative Yuan regarding the meeting of the Council and trials conducted in regular courts. Since the Council decides its cases almost on an objective procedure, that is, relies on the written statements of the parties and the opinion of the concerned public agency, the principle of public trial is not necessarily to be applied. As for its internal deliberation, complete secrecy does, and must, exist. Otherwise, the members of the Council simply could not maintain proper relations and harmony in the transaction of business. The confidence of Grand Justices in their communications with one another should be fully respected.

With regard to direct persuasion of the Council by the parties in a case, the Council never holds an open hearing. It may, though very rarely, request parties to come to the conference to give an oral explanation.⁸¹ All the cases before the Council are decided on the basis of an examination of the papers, *ie.*, the records of the case, the briefs, and the research reports of the Grand Justices. The possible purpose of an oral explanation may be to uncover additional facts that bear upon the issues.⁸²

79. Frankfurter, *Mr. Justice Roberts*, 104 U. PENN. L. REV. 311, 313 (1955).

80. LI-FA-YUAN-KUAN-PAO (Gazette of the Legislative Yuan) 21st., 15th sess. 52 (1957).

81. This only happened once, on Interpretation No. 148, and the party only came to the second section of the Secretariat of the Judicial Yuan, which is charged with the administrative matters of the Council. This information is provided from an interview with Mr. Yu-po Cheng, a current member of the Council.

82. Oral argument is also held only infrequently in the West German Federal Constitutional Court; see KOMMERS, *supra* note 44, at 180. It is relatively surprising that the Japanese Supreme Court, which followed the model of the United States

In striking contrast to the freedom of the Justices of the United States Supreme Court to express individual views in dissenting or concurring opinions, the Grand Justices follow traditional continental jurisprudence.⁸³ Only one opinion, which presumably represents the official consensus, is issued in each case, and the identity of the author may not be disclosed to the public. This was done because it was feared that the publication of dissenting opinions could impair the prestige of the Council and create uncertainty. On the other hand, the elimination of the dissenting opinion could result in a serious impairment of this invaluable source of public discussion and public debate, which are the characteristics of a democratic society. In addition, the possibility of writing and publishing differing opinions would give each judge a keener sense of responsibility for the decision and also provide an opportunity to change former decisions demonstrated to be unsound, thereby contributing greatly to the development of jurisprudence.⁸⁴ This argument may be amply supported by the case of the United States Supreme Court. Not a few among the most memorable opinions of the Court initially on the dissenting side have eventually become majority opinions.⁸⁵

Nevertheless, an indiscriminating eulogy of the practice of issuing dissenting opinions by some foreign scholars is not totally desirable. The appearance of a dissenting opinion often forces the majority to take positions more extreme than were originally intended, but this tendency has been largely ignored.⁸⁶ Moreover, the exercise of individual judicial opinion-writing can at times produce a less-reasoned statement of the grounds for disagreement. On the whole, the right to dissent on well-chosen occasions, if wisely used, no doubt can be of great service to the profession and to the law. But

Supreme Court, also conducts oral arguments only infrequently; see Itoh, *supra* note 65, at 153.

83. Only after 1971 were the justices in the Federal Constitutional Court of West Germany allowed to express their dissenting opinions; see KOMMERS, *supra* note 44 at 180.

84. For a discussion of the pros and cons of the dissenting opinion, see McWhinney, *Judicial Concurrence and Dissents: A Comparative View of Opinion — Writing in Final Appellate Tribunals*, 31 CANADIAN B. REV. 595-625 (1953); Nadelmann, *The Judicial Dissent, Publication v. Secrecy*, 8 AM. J. COMP. L. 415-32 (1959).

85. Several distinguished cases have been cited in ABRAHAM, *supra* note 76, at 203.

86. Mr. Justice Jackson cited the notorious Dred Scott case as a classic example in which Chief Justice Taney's extreme statements were absent in his original draft and were inserted only after Mr. Justice McLean, then a more than passive candidate for the presidency, raised the issue in dissent. See R. JACKSON, *SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 19 (1955).

there is nothing good, for either the court or the dissenters, in dissenting *per se*.⁸⁷

Not until 1957 did the Governing Law recognize the value of the different opinions and reverse its previous course. Since then differing opinions can be issued by the individual Grand Justices.⁸⁸ Since the provision uses the term "different" generally, it appears to include both dissenting as well as concurring opinions. However, in practice, there have only been three concurring opinions.⁸⁹ On the other hand, the rate of dissents has been quite impressive. Thirteen of the nineteen cases since 1957 relating to the Constitution have borne dissenting opinions. In a society in which consensus, harmony, and unanimity are important values, such a high rate of dissent must be very meaningful. Since the pressure for social harmony and for outward unanimity is rather strong, the Grand Justices, like individuals in an ordinary social context, customarily seek to reconcile their different positions among themselves. Conscious that if the majority is divided over its reasons the decision may lack authority for other public agencies and the regular court, the Grand Justices always attempt to agree on common grounds by sacrificing to some degree the particularity of their opinions. The near absence of concurring opinion may be explained by this fact.

Since January 7, 1977, the author of the dissenting opinion has been identified to the public.⁹⁰ This is a reversal of the previous practice of giving only the number of those dissenting and their opinions. Of course, this amendment is a significant step toward the study of judicial behavior of the Council. The reason for this change was that one Grand Justice in his dissenting opinion criticized sharply the majority opinion and was warned by some Grand Justices not to issue it. After he willingly accepted responsibility for his dissenting opinion by affixing his name to it, the Rules were amended.⁹¹

On the other hand, there is one amendment which restricts the issuance of different opinions. The only different opinion which is permitted is one with respect to the principle of the syllabus of interpretation.⁹² In other words, collateral issues are beyond the scope of different opinions. This reflects the continuing threat posed by

87. *Id.*

88. Article 17.

89. Interpretation Nos. 115, 128, 130.

90. Rules, art. 7, para. 2.

91. Yao, *supra* note 61, at 57.

92. Rules, art. 7, para. 1.

some narrow-minded Grand Justices within the Council and the continued influence of the traditional unanimity doctrine.

Another restriction, however, is far more serious. According to article 7 of the Rules, the different opinion must be submitted within five days after the syllabus of the interpretation has been passed by the Reviewing Bench. This is a severe restriction to the development of a different opinion not only because the time is unreasonably limited, but also because in practice it often renders the submission impossible since the syllabus of the interpretation and the supporting opinion are sometimes not reached in the same conference, even though the Rules require that the latter shall be attached to the former.⁹³ How could a different opinion be submitted without first reviewing the supporting opinion of the case? Furthermore, the final stage of the whole process is the Grand Bench, which is held on the Friday fortnight. Even if the different opinion is submitted on the final allowable day, there are still nine more days before the Grand Bench convenes. There are simply no grounds for imposing such a time restriction.

Nevertheless, it is worth mentioning that although, theoretically, a shift in positions between the Reviewing Bench and Grand Bench where the final vote is conducted should not happen, as the former should have already resolved all disputes and decided the content as well as the supporting opinion of a case, there have been at least two occasions in which the original conclusion reached in the Reviewing Bench was questioned later and had to be revised in order to be passed by the Grand Bench.⁹⁴ This indicated that post-Reviewing Bench "line-up" switches are still possible and that different opinions may in this context play some role in changes of votes. The extent to which this is significant is not known.

The major purpose of the different opinion until now has been one of clarification. Without it, decisions sometimes do not include the ideas, the fears, or the explanations behind the Council's conclusion. Whether the issuance of different opinions will eventually serve as "the intelligence of a future day"⁹⁵ is yet to be established. This might be attributed in part to the fact that only a limited period of time has passed.

Since the judicial biographies or histories which have tremendous value in the studies of the American Supreme Court are totally

93. Rules, art. 3, para. 2.

94. Different opinion of Interpretation Nos. 130, 137.

95. C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928).

nonexistent in the Republic of China, research on the process of law making within the Council has been severely limited. This, coupled with the fact that, unlike the system of law clerks in the United States Supreme Court, the Grand Justices conduct their research and draft opinions themselves, makes research difficult. The opinions of former law clerks of the United States Supreme Court that often contain enormous information for the study of the American Supreme Court is simply lacking.⁹⁶ In addition, the self-made Rules also explicitly direct that anything relating to the disposition of a case, such as the assignment of the application, discussion or debate in the conference, and any other related procedure should be kept secret.⁹⁷ These are difficult problems that must be overcome if a more in-depth examination of the decision-making process of the Council of Grand Justices can be achieved in the future.

96. *E.g.*, H. WILKINSON, *SERVING JUSTICE* (1974).

97. Article 12.

CHAPTER V

PRACTICE OF JUDICIAL REVIEW

A. General Survey of the Output

Against the backdrop of these structural and procedural aspects of the Council of Grand Justices, we now proceed to a review of its output. Having begun its serious work in 1949, after moving with the nationalist government to Taiwan, its workload in the area of constitutional review has been comparatively modest. Of the 167 applications lodged with the Council up to the end of 1975, only thirty-five have resulted in decisions. However, another sixteen decisions relating to the uniform interpretation of statutes or ordinances may be added to the above category because they have had constitutional significance. The work of interpreting statutes or ordinances has thus far occupied a large amount of the business of the Council. Compared with the 167 applications for constitutional decisions, there were 1145 cases in which there have been applications for uniform interpretation. In other words, the Council has done more in the field of maintaining the unity of laws than in the field of constitutional review. The situation, of course, substantially diminishes the practical significance of the Council as a constitutional organ.

Table I gives a chronological representation of cases decided and indicates which parties initiated each application since the inception of the Council. The Table shows that after two cases were decided on January 6, 1949, there were no interpretations rendered until May 21, 1952 because of the chaos and political confusion in mainland China.

TABLE I
(INITIATION OF CASES)

Year	Applicant								Total
	Executive	Legislative	Control	Assembly (national)	Assemblies (local)	Court	Individuals	Others	
1949	1	0	0	0	0	0	0	1	2
1950	0	0	0	0	0	0	0	0	0
1951	0	0	0	0	0	0	0	0	0
1952	2	0	1	0	0	0	0	0	3
1953	6	1	4	1	0	0	0	0	12
1954	6	0	1	0	0	0	0	0	7
1955	3	0	0	0	0	1	0	0	4
1956	0	0	1	0	0	0	0	0	1
1957	1	0	0	0	3	0	0	0	4
1958	2	0	0	0	0	0	0	0	2
1959	0	0	0	0	0	0	0	0	0
1960	1	0	0	1	0	0	0	0	2
1961	0	0	1	0	0	1	0	0	2
1962	0	0	0	0	0	0	0	0	0
1963	1	0	0	0	0	0	0	0	1
1964	0	0	1	0	0	0	0	0	1
1965	0	0	0	0	0	0	0	0	0
1966	2	0	0	0	0	0	1	0	3
1967	1	0	1	0	0	0	0	0	2
1968	0	0	0	0	0	0	0	0	0
1969	0	0	0	0	0	0	0	0	0
1970	1	0	1	0	0	0	0	0	2
1971	1	0	0	0	0	0	0	0	1
1972	0	0	0	0	0	0	0	0	0
1973	0	0	1	0	0	0	0	0	1
1974	0	0	0	0	0	0	0	0	0
1975	0	0	1	0	0	0	0	0	1
1976	0	0	0	0	0	0	0	0	0
1977	0	0	0	0	0	0	2	0	2
1978	0	0	0	0	0	0	2	0	2
Total	28	1	13	2	3	2	5	1	55

After resumption of business, twenty-six constitutional interpretations were rendered in the period between 1952 and 1955. The number is quite impressive compared with the scarcity of decisions in other years. The reason for this concentration might be that there were so many pending constitutional questions that needed to be dealt with in order to cope with the aftermath of the defeat in the civil war. After that, although judicial review of constitutional questions did not disappear altogether, it certainly became infrequent. This may be due in part to the stringent procedural requirements imposed by Governing Law and Rules. The Council's strong pro-government leaning in the past may also have deterred the individuals from filing constitutional grievances.

More than half of the decided cases were considered as a result of applications by the Executive Yuan. Considering the enormous and still expanding number of agencies subordinate to the Executive Yuan, this number is not surprising. Nevertheless, after 1972, the more active role played by the Executive Yuan seems to have changed. The real reason behind this change is unclear. On the one hand, we may assume that every agency has made serious efforts to study and resolve constitutional problems as they have arisen. And, when conflicts involving two agencies developed, out-of-court settlements have been preferred. On the other hand, the constitutionality of either statutes and administrative ordinances might not be of much concern to the public officials who applied them. These officials rarely were concerned with whether the people's rights or liberties were illegally invaded or limited.

Since the regular session of the National Assembly is held ninety days prior to the expiration of each presidential term, the period in which it can perform its prescribed duty is rather limited. Thus, it is not surprising to find that only two cases, one even proposed jointly with the Executive Yuan,¹ were raised by the National Assembly. On the other hand, legislation is the major work of the Legislative Yuan, which may revise any statute at any time it deems necessary to do so. The need to ask the Council of Grand Justices to decide the constitutionality of a statute seems very remote if the Legislative Yuan performs its legislative duty properly and scrupulously. The result is that only one case decided by the Council was initiated by the Legislative Yuan.²

1. Interpretation No. 85.

2. Interpretation No. 29. It is interesting to note that this application questions the extent of authority exercised by the National Assembly.

It is striking that over 2 million cases reached a variety of courts during this period,³ yet only two cases produced applications to the Council on the part of the ordinary courts.⁴ Several reasons can be given for this. One is that judges of these courts, who were trained and socialized in a civil-servant-oriented establishment, have traditionally had general confidence in the constitutionality and legality of the statutes, and, accordingly, find it hard to accept judicial review. Another is the unfamiliarity with the procedure of application. Lower courts always thought they were required to go through each higher court in the hierarchy to certify their cases. Such passivity notwithstanding, applications from the regular courts have been steadily increasing since 1970.⁵

Although the "Rules of Order" (which were superseded by the "Rules Concerning the Conduct of Business by the Council of Grand Justices" [hereinafter referred to as "Rules"] after the promulgation of the Governing Law) allowed a local government agency to apply directly to the Council, the local assemblies on two occasions referred their cases first to the local executive department, the provincial government, and then to the Executive Yuan, the superior of the provincial government, for the purpose of seeking constitutional interpretations from the Council.⁶ The Governing Law of 1958 explicitly provided that any central or local government agency is entitled to file with the Council. Thereafter, three cases were initiated directly by local assemblies.⁷ Because they were decided in close succession within a period of three months in 1957 and because there have been no further local assembly applications for constitutional interpretation since then, their significance as affirmative precedents was minimized considerably. However, interpretation No. 122 perhaps opened a new avenue for the local assemblies. It was

3. There have been 2,444,887 cases during 1958-75 period; see CHUNG-HUA-MING-KUO TUNG-CHI-TI-YAO (The Statistical Data of the Republic of China) 780-803 (1975).

4. Nos. 47 & 89.

5. There were only four applications from the regular court before 1970, all of them concentrated between 1952 and 1954. Since 1970, every year has seen cases in which the courts have applied for review. Although the numbers are not large (1970: 1; 1971: 1; 1972: 2; 1973: 2; 1974: 2; 1975: 1), this shows an encouraging trend implying that more judges realize the importance of judicial review and have attempted to use it; see CHUNG-HUA-MING-KUO TUNG-CHI-TI-YAO (Statistical Data of the Republic of China) 773 (1974), 811 (1975).

6. Interpretation Nos. 38 & 42.

7. Interpretation Nos. 74, 75, & 77.

filed by the Control Yuan at the request of a local assembly, though there was no formal administrative relation between the two bodies. The absence of full knowledge of the procedural aspects of the related statutes and rules contributed largely to this irregularity.

Closely related to the standing of local assemblies is the question of whether the local government, and its executive branch, can bring a case into the Council. Since both the Governing Law and the Rules provide for application by a "local government agency," the local executive branch should presumably be included. However, there has not yet been a single case filed by a local administration. Have no such administrations ever intended to ask for a constitutional interpretation? A close examination reveals that four cases brought by the Executive Yuan were begun by a local administration.⁸ Another one filed by the Control Yuan was also a result of local administration initiative.⁹ Apparently, local administrations, like local assemblies, had insufficient knowledge of their privilege to file suit directly.

In addition to the Executive Yuan, the Control Yuan has also maintained a high percentage of applications to the Council. Since it has established ten committees, corresponding to the ten ministries and commissions in the Executive Yuan, in order to check on the work of the latter, and since it may send a corrective measure to it,¹⁰ the constitutionality of an administrative ordinance of course is under its purview. Although other important functions, such as impeachment and censure, are directed at the illegal conduct of public officials, in the process of investigation the constitutionality of a statute or administrative ordinance may also be called into question. In addition, the fact that the Control Yuan receives complaints directly from the people provides it with numerous opportunities to find constitutional problems with statutes. Moreover, since it is highly respected, being a century-old tradition that now makes it equal to other central government agencies, its requests generally carry more weight and are well received by the Council of Grand Justices.

8. Interpretation Nos. 17, 24, 35, & 115.

9. Interpretation No. 20.

10. The Executive Yuan, or its ministries and commissions, is required to act and report to the Control Yuan within two months; see article 25, the Law of Control.

Among the 167 applications, 110 were filed by individuals. Table II marks the increase in this category over the twenty-year period until 1975, although the pattern of growth is not always constant. The relative growth and consistency in the year-to-year figures underscore the gradual importance this category of applications occupied as an indication of the institutional stability of the Council. It makes up a full two-thirds of all docket applications. However, because only one application succeeded in producing a constitutional interpretation through 1976,¹¹ this result doubtlessly discouraged further applications by the people. The remaining applications were dismissed more readily than *certiorari* petitions are denied by the United States Supreme Court.¹²

TABLE II

APPLICATION FILED BY INDIVIDUALS, 1950-1975

<i>Year</i>	<i>Number</i>	<i>Year</i>	<i>Number</i>
1950	1	1964	6
1951	0	1965	4
1952	6	1966	7
1953	2	1967	3
1954	5	1968	6
1955	0	1969	15
1956	0	1970	14
1957	0	1971	11
1958	2	1972	0
1959	1	1973	1
1960	5	1974	0
1961	4	1975	6
1962	5	Total	110
1963	6		

Before the promulgation of the Governing Law in 1958 only government agencies were entitled to be parties in constitutionality proceedings; the refusal of an individual's application was an inevitable consequence. However, there were eight cases in which a government agency filing with the Council was for an individual.¹³

11. Interpretation No. 117, rendered in 1966.

12. Between 85 and 90 percent of all *certiorari* applications have been denied, and few of them received reasons for the denial; see H. ABRAHAM, *THE JUDICIAL PROCESS* 177 (1975).

13. Interpretation Nos. 1, 4, 5, 30, 68, 74, 75, & 77.

Although the Governing Law explicitly grants standing to the people, almost all applications by individuals have failed. They were dismissed as frivolous or rejected for not meeting procedural or jurisdictional requirements. The most common ground for rejection was that the individual had either not exhausted regular legal remedies or had not indicated what specific constitutional rights had been violated. The significance of granting standing to individuals has thus been seriously minimized by rigid procedural barriers.

However, an encouraging sign seems to have emerged since 1976, the beginning of the current term of the Council. Four applications filed by individuals were accepted and decided.¹⁴ Significant in their own right, they represent all the cases decided by the Council in 1976 and 1977. Although the decisions were unfavorable to the applicants, the fact that the applications were accepted indicates that the attitudes of the current Grand Justices may differ to some extent from those of their predecessors. Among the five cases successfully filed by individuals with the Council, the first and third were initiated by substitutes for either the National Assembly or the Legislative Yuan in an attempt to challenge administrative orders preventing them from filling vacancies.¹⁵ The interests they intended to protect were limited to a special area and thus were not shared by the general public. However, the second, fourth, and fifth cases were effected by ordinary people;¹⁶ the subject matter addressed by the latter two was the constitutionality of judicial precedents rather than a statute or administrative ordinance. This represented a rather more liberal attitude toward the rigid procedural requirement imposed by the Governing Law, which had stated that only a law or ordinance could be questioned in the case of an individual's application. This positive change may again make the Chinese people more willing to go to the Council when they feel that their constitutional rights are being violated.

Table III gives the government agency's or the individual's grounds for seeking a constitutional interpretation. About half of the applications involved "doubts and problems concerning the Constitution." In other words, clarification of the meaning of words or sentences in the Constitution has been the major concern of the Council. Judging the constitutionality of statutes or ordinances, which one usually considers the Council's more important function,

14. Interpretation Nos. 148, 150, 153, & 154.

15. Interpretation Nos. 117 & 150.

16. Interpretation Nos. 148, 153, & 154.

has been at issue in only six cases, and these were either filed by the Control Yuan or by an individual. The paucity of these cases clearly implies that attention paid by the executive branch to the constitutionality of statutes or ordinances is inadequate. Therefore, without granting standing to the individual, the protection of an individual's constitutional rights would be virtually meaningless. The performance of the Control Yuan is particularly admirable, and it hopefully will continue vigorously to proclaim the theme of protecting human rights.

TABLE III
rounds of proceeding NUMBER

1. Doubts and problems concerning the constitution.....	26
2. Conflicts between central government organs	2
3. Constitutionality of statutes	3
4. Constitutionality of ordinances.....	3
5. Others	22

The early fear that channeling into a judicial forum conflicts between government agencies which were fundamentally political in character would jeopardize the sound development of the democracy has proved to be groundless. Only two cases belong to this category.¹⁷ Conflicts among the five Yuans usually are resolved by negotiation in a conference conducted by the President.¹⁸ Almost all other conflicts have been settled before coming to the Council. It thus seems that government agencies have not found the Council a convenient or necessary forum in which to resolve conflicts among themselves. Only as a last resort is application to the Council considered.

Conflicts between central and local government agencies are conspicuously absent from Table III. This may be due to the fact that the Kuomintang controls both the central and local governments. It also may be due to the fact that local territory has always been under the very close supervision of central officials, and any conflict that arises would be resolved quickly. Furthermore, the local government's ignorance of the procedure for bringing an application directly to the Council has contributed significantly to their submissiveness.

17. Interpretation Nos. 3 & 76. The decision of No. 76 did cause some political criticism. It declared that the combination of the Legislative, Control Yuans and National Assembly amounted to a parliament in the western countries. Some members of the Legislative Yuan, thinking that only their organ qualified for this match, criticized this decision vehemently.

18. See Chapter III, at 125-26.

A meaningful examination of judicial review in any particular country cannot be made merely on the basis of constitutional and other legislative provisions. It has to delve into the detailed work of the responsible court — in the case of the Republic of China, the Council of Grand Justices. Since the system of judicial review originated historically in the United States, a comparison of some selected Chinese decisions with their American counterparts will afford the reader a better understanding of the actual function of the Council and of the practical effects of its work.

The court's decision in a civil law country is extremely brief and abstract. It generally begins with a reference to the applicable code provisions. This is followed by a short statement of facts, and then by a conclusion of fact and law. A full analysis of either the facts or the law is rarely found, which makes a detailed comparison with the American judicial decision very difficult. The interpretations rendered by the Council of Grand Justices are no exception. Still, the extremely abstract quality of those decisions was mitigated somewhat after the majority opinions of the Council, as well as any separate opinions, were presented to the public after 1958. The separate opinions have been particularly useful, because they often provide a detailed study of the facts and law and sometimes reveal valuable information about the internal functioning of the Council.

B. Selected Decisions

1. Ex Post Facto Doctrine

Of the thirty-nine constitutional interpretations, three have related to the ex post facto principle. According to article two of the Criminal Code, "an act is punishable only if expressly so provided by the law in force at the time of its commission." In addition, the same article further provides that if the laws at the time of the trial are different, the law most favorable to the offender shall apply. Nevertheless, the application of this principle has been limited to ordinary criminals as a result of these three interpretations. Those criminals who commit a crime of a political nature will be prosecuted with the heavier punishments specified in the Statute for Punishment of Rebellion, even though it was promulgated after their acts were committed. Not only will such criminals be more severely punished,¹⁹

19. For example, article 100(1) of the Criminal Code provides that a person who "undertakes to destroy the national polity, seize state territory, change the Constitution by illegal means or overthrow the government" may be punished with imprisonment for not less than seven years. But article 2(1) of the Statute for Punishment of

but they will also be tried by a military court as the result of the state of siege declared over the whole territory of the Republic of China on May 20, 1949.²⁰

The term "state of siege" is used rather than "martial rule." The difference lies essentially in the divergent attitudes between a common and civil law system toward the origin of this emergency measure. The former emphasizes the suspension of the rule of law, whereas the latter seems to regard the emergency as an effective threat against public safety and order. In short, the criterion in deciding the extent of seriousness influenced by the emergency is different in these two systems. As a result, the prerequisite for imposing martial rule in the United States is either that the civilian courts are closed or they can no longer perform their function properly.²¹ This condition does not apply to a state of siege, under which the civilian courts may still function and only those crimes against national security, the constitution, and the public safety and order are under the jurisdiction of military courts. The civil and military powers within the government work side by side in a spirit of cooperation and do not have to be substituted one for the other as in the case of a common law country.²² Another major difference should not be ignored. The executive and/or the legislature in civil law countries has the final word as to whether an emergency situation

Rebellion makes capital punishment mandatory for the same offense. Although according to article 100(2) of the Criminal Code, a person who "prepares or conspires to commit the above offense" is punishable with imprisonment for not less than six months and not more than five years, article 2(3) of the Statute for Punishment of Rebellion proscribes for the same offense a penalty of imprisonment for not less than 10 years.

20. This proclamation automatically carried into operation the whole body of Martial Law. Article 8 specifically provides that during the period of enforcement of Martial Law the military organ may try, by itself, certain offenses including those against the internal and external security of the state and those against public order and public safety.

21. Traditionally, the fact that civil courts are open has precluded the use of martial law. However, the doctrine has undergone a revision, because the nature of modern war has changed; it is still possible for the civil courts to open even in the actual fighting zone, and whether the function of the courts is obstructed should be the real criterion. See Warren, *Spies, and the Power of Congress to Subject Certain Classes of Civilians to Trial by Military Tribunal*, 53 AM. L. REV. 195, 201 (1919). Robert Rankin also cited a list of supporting articles on this point; see R. RANKIN, *WHEN CIVIL LAW FAILS* 181-84 (1939).

22. For details, see C. ROSSITER, *CONSTITUTIONAL DICTATORSHIP* 86-87 (1948).

has arisen; the courts assume this function under the common law. "Politically speaking, this means that a political body, an admittedly partisan organ, has the ultimate authority in continental jurisdictions whereas a non-partisan authority, which presumably tries to be non-partisan, has the last word in Anglo-American jurisdiction."²³

All these features of the state of siege have appeared in the Republic of China since 1949. The President has the power to initiate the state of siege, although such power is subject to confirmation by the Legislative Yuan. The latter by resolution may ask the President to terminate the state of siege. The regular court provides no check upon the declaration of the state of siege either at the time of the proclamation or after the disturbing conditions have been allayed. The structure and functions of government and the way of life of the people are left almost unaffected by the state of siege. Citizens who mind their own business may hardly know that a state of siege has been declared. Moreover, non-military personnel are subject to a military trial only if they commit one of three types of crimes: sedition and espionage; theft or unauthorized sale or purchase of military equipment and supplies; or stealing or damaging public communication equipment and facilities. These restrictions upon the enforcement of military trial are expressly provided in article 2 known as the "Measures Governing the Classification of Cases to be Tried by the Military Judicial Organs Themselves and Those Which are to be Turned Over to the Courts in the Region of Taiwan during the Period of State of Siege."²⁴ Significantly, the scope of the military judicial organs' involvement has gradually been reduced with a series of revisions in 1954 and in April and September of 1967.²⁵ A fair consideration of the state of siege in the Republic of China should never fail to take account of these special "Measures."

It is understandable that a military court has been assigned to impose heavier punishments for crimes of sedition or espionage since the threat of war from the People's Republic of China has never ceased. Furthermore, subversives were always being sent to Taiwan

23. C. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY* 240 (1941).

24. There would be more than one hundred kinds of crime to be tried by military courts if the government strictly followed the provisions of Martial Law.

25. For a fairly detailed investigation of the causes of these revisions, see I. Wang, *The Delimitation of Criminal Jurisdiction among Military and Civilian Judicial Organs in the Region of Taiwan during the Last Twenty Years*, in FA-LIN-YUEH-KAN ERH-SHIH-CHOU-NIEN CHI-NIEN-LUN-WAN-CHI (Symposium in Honor of Twentieth Anniversary of China Law Monthly) 423-37 (S. Yu ed. 1970).

to undermine its strength in the hope that it would fall under the control of the Chinese Communists. No government in a similar mortal struggle ever dealt less severely with rebels.²⁶ The right of self-preservation of any country is paramount. Nevertheless, the necessity of refusing application of the ex post facto doctrine in cases covered by the Statute for Punishment of Rebellions is another question which needs to be carefully examined.

In both Interpretation 68 and 80 the military courts decided that the defendants joined the Communist Party only for a short period and disassociated themselves from it by either severing their connection or even by joining the Nationalist army. Furthermore, the defendants were also cleared from having any kind of relationship with the Communist Party since 1949 when the Nationalist Government resettled itself in Taiwan. The facts in the case resulting in Interpretation 129 went further. Defendants were punished for their membership in the Communist Children Regiment when they were only thirteen years old. The punishment is hardly acceptable in light of article 18 of the Criminal Code, which provides: "An act committed by a person who has not completed the fourteenth year of his age is not punishable."

A consistent issue in these three Interpretations was the continuous nature of the crimes. For those people who had once joined the Communist Party, regardless of the duration of their membership and regardless of their age when they joined, there were only two grounds for exemption from later criminal prosecution: either by surrendering themselves to the authorities or by possessing other facts proving that they had definitely disassociated themselves from any subversive organizations supported by the Communists. These two criteria have not been given equal weight. The record clearly shows that inactivity for ten or more years does not constitute convincing proof of disassociation from the Communist Party. Even joining the Nationalist army was not enough. What other more significant action could one take to prove he no longer works for the Communists? There thus seems to have been only one viable alternative available to those defendants, namely, to give themselves

26. President Lincoln suspended the writ of habeas corpus at the outbreak of the Civil War, and his action was later approved by both the Congress and the Supreme Court. During the first World War, various treason laws such as the Espionage Act of 1917, the Sedition Law of 1918, and provisions in the Selective Service Act and the Trading with the Enemy Act were promulgated. For these statutes, see 12 STAT. 326, 40 STAT. 217, 553, 76, 411.

up to the law if they wished to be assured that they would not be punished in the future.

The Statute of Punishment of Rebellion does not require that those surrendering defendants be exempted from punishment; rather it gives the prosecutor full discretion to prosecute or not. During the trial the judge also may, in his discretion, reduce or remit the punishment based on the relevant facts of a particular case. Since surrendering oneself to the authorities does not necessarily ensure a favorable result, a person once involved with the Communist Party may be reluctant to expose himself to the government. If the involvement was rather minor and of short duration — in other words, if the individual neither engaged in any active role nor contributed substantially to the Communist Party — then any past criminal conduct may be treated leniently. It is natural that such an individual simply wants to forget about these unfortunate incidents and tend to his present life. The danger he or others like him might pose to the present government is negligible as he has had no relation at all with the Communists for decades. In addition, the possible harm done during his past, short involvement can hardly be ascertained. The defendants in Interpretation No. 129 could hardly have been expected to have had actual knowledge about the nature of Communism when they joined at thirteen years of age. It is quite possible that theirs was merely a group action with other children, ordered either by their parents or teachers. The question of voluntary participation may also be applied to the other two Interpretations in light of those defendants' involvement for a short period of time and their later inactivity.

Accordingly, the doctrine under which middle-aged people may still be sent to prison for political indiscretions committed during their tender years — a doctrine upheld by the Council of Grand Justices — has its inherent risks and for practical purposes is unnecessary. Its effect as a deterrent to the spread of subversive actions of the Communist Party is open to serious challenge.

On the other hand, the threat of government prosecution in the indefinite future against those persons may give them no alternative but continual cooperation with the Communist Party. Because the consequences of being punished by the Statute for Punishment of Rebellion may prove to be very severe, other kinds of criminals may also use this threat as a form of blackmail to seek an individual's cooperation when his past record is revealed to them.

The opinion of the Council was vehemently attacked by a dissenting opinion in the case of Interpretation No. 129.²⁷ Its argument mainly lies in the exemption of criminal culpability for individuals under fourteen years of age. Whether the *ex post facto* doctrine should be applied to the political case was not mentioned at all.

One objection to retroactive laws is that they fail to provide fair warning. Only if an individual is warned that his contemplated acts are punishable can society expect him to refrain from acting. A related objection is that such laws frustrate a reliance upon existing law. The essential unfairness of retrospective legislation has long been recognized. Retroactivity was condemned in both the *Corpus Juris* of Justinian and the canon law, and such condemnation formed the basis of the principle phrased in modern European law in the words *nulla poena sine lege*.²⁸ The feeling was so strong that two future justices of the American Supreme Court²⁹ among the Framers even went further by proposing that the prohibition against *ex post facto* laws was unnecessary: "there was no lawyer, no civilian who would not say that *ex post facto* laws are void in and of themselves."³⁰

Moreover, it is believed that the *ex post facto* clause of the United States Constitution embraces all retrospective laws or laws governing or controlling past transactions, whether they are of civil or a criminal nature.³¹ However, the Supreme Court soon construed the constitutional language in a much more restricted sense. In the 1798 case of *Calder v. Bull*,³² the high bench established that the *ex post facto* clause only reached laws that are criminal in nature. Although this restrictive application was challenged at times,³³ it has been followed by practically all of the courts.

27. When both the Nos. 68 and 80 were decided, different opinions were not allowed to be published. Therefore, there is no way to know if different opinions were ever raised in conference.

28. See M. RADIN, *HANDBOOK OF ROMAN LAW* 425 (1927).

29. They were Oliver Ellsworth and James Wilson.

30. Brant, *The Madison Heritage*, in *THE GREAT RIGHTS* 13, 32 (E. Cahn ed. 1963).

31. J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1339 (1891); Field, *Ex Post Facto in the Constitution*, 20 *MICH. L. REV.* 315 (1922); Crosskey, *The True Meaning of the Constitutional Prohibition of Ex post-Facto Laws*, 14 *U. CHI. L. REV.* 539 (1947). But there is some evidence to suggest that "the terms 'ex post facto' related to criminal cases only; that they would not consequently restrain the states from retrospective laws in civil cases." Quoted in E. DUMBAULD, *THE CONSTITUTION OF THE UNITED STATES* 194 (1964).

32. 3 *Dall.* 386 (1789).

33. *Satterlee v. Matthewson*, 2 *Pet.* 380 (1829); *Ogden v. Saunders*, 12 *Wheat.* 213 (1827).

An answer to the question of whether a particular statute involves criminal or penal matters so as to fall within the ban against ex post facto laws has never been easy. Test oaths prescribed after the Civil War, whereby office holders, teachers, or preachers, were required to swear that they had not participated in the revolt, were held invalid as an attempt to punish those individuals for past offenses.³⁴ However, statutes authorizing the deportation of a resident alien because of his prior membership in the Communist Party have been construed as involving a civil remedy and not a criminal punishment. The highest tribunal in a leading 1924 case, *Mahler v. Ebby*,³⁵ held that deportation was neither a criminal proceeding nor punishment; it was simply a refusal of government to harbor persons it does not want, no matter how harsh the consequence may be for the individual concerned.

The reasoning has been criticized throughout the history of the United States. James Madison attacked it in speaking of the first Alien and Sedition Act proposed in the United States:

if a banishment of the sort described be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.³⁶

Others, such as Justices Brewer, Brandeis, Black, and Douglas, have also been unable to accept the views of different majorities of the Supreme Court. Justice Brandeis expressed it most succinctly when he said that deportation may deprive a man "of all that makes life worth living."³⁷ Justice Douglas also spoke of it as "punishment in the practical sense."³⁸ Although the majority of the Supreme Court was still unwilling to depart from the rule that deportation is not penal,³⁹ it is apparent that the Court thought it was a bad rule when the severity of deportation was fully considered. Thus, Justice Frankfurter, speaking for the majority, admitted: "And since the intrinsic

34. *Cummings v. Missouri*, 4 Wall. 277 (1867); *ex parte Garland*, 4 Wall. 333 (1867).

35. 264 U.S. 32.

36. As quoted in the dissenting opinion of Justice Field, *Fong Yue Ting v. U.S.*, 149 U.S. 698, 759 (1893).

37. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

38. *Harisiades v. Shaughnessy*, 342 U.S. 580, 600 (1952).

39. In a 1953 decision, the high bench said: "It would be an unjustifiable reversal to overturn a view of the Constitution so deeply rooted and so consistently adhered to." *Galvan v. Press*, 347 U.S. 522, 531 (1953).

consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* clause even though applicable only to punitive legislation, should be applied to deportation."⁴⁰

Since the regulation of an alien's entry and presence has been traditionally vested in the Congress, other branches of government deferred strongly to this policy. This may explain why the protection given aliens by the Constitution has not been guarded by the courts with the vigor and clarity that a citizen might expect. As for the ordinary American citizen, punishment based solely on his or her membership once in the Communist Party has been rejected by the Supreme Court. In *Scales v. U.S.*,⁴¹ Mr. Justice Harlan speaking for the majority stated that only that person who was an "active" member of a subversive group with knowledge of its illegal advocacy and had a specific intent to bring about a violent overthrow of the government may be punished. In other words, merely "a nominal, passive, inactive or purely technical" membership cannot be deemed sufficient to convict.⁴²

The element of active membership was arrived at on the grounds that (1) the penalty imposed by the statute was too heavy for Congress to have intended to punish mere passive members and (2) Congress would have imposed an objective standard of membership as fixed by the law itself, rather than allow it to vary with the standards of membership as subjectively viewed by the organization.⁴³ By rejecting the defendant's contention of first amendment guarantees, the Court found that a sufficient and significant form of aid and encouragement to the illegal acts in the required elements of active membership in addition to knowledge of illegal advocacy and specific intent were sufficient to permit the imposition of a criminal sanction.

It is apparent that what the Court has done is to define the Internal Security Act of 1950 in such a way as to avoid more difficult problems of constitutionality. It would seem that conviction for the mere act of becoming a member in such an organization might raise the constitutional problem under the First Amendment. However, the

40. *Id.*

41. 367 U.S. 203 (1961).

42. *Id.*, at 220.

43. *Id.*, at 222. It is also helpful to avoid conflict with the Internal Security Act of 1950 § 4(f), 64 Stat. 992, 50 U.S.C. § 783(f) (1958), which provides: "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute."

distinction between active and nominal membership may be not at all clear. "Active" can indicate a degree of activity ranging from fulltime work on the organization or on behalf of it, to attending meetings, or merely paying dues. The government stated in its brief that:

Even though the activity be expanded along lines not otherwise illegal, . . . active support of any kind aids the organization in achieving its own illegal purpose. The solicitation of membership, the contribution of financial assistance, or the handling of public relations all help the organization and therefore indirectly promote its objectives. . . . Any activity which contributes to the ultimate success of the undertaking bears its share of responsibility for that outcome.⁴⁴

As the importance of a government's self-preservation is fully recognized, use of certain means to control the advocates of violent overthrow is clearly justifiable. The Chinese Communists occupying the mainland since 1949 have never abandoned the ultimate goal of bringing Taiwan within the domain of the mainland. Regardless of the fact that the term it used has changed from "liberate" to "unify," the possibility of mainland China's employing armed force to achieve its aim has been real. Before the mainland acquires the capability to launch a fatal attack on Taiwan, she will not hesitate to take any actions which can create internal problems of which she may take advantage. Taught by the painful lesson of losing the mainland and facing a continuing threat of infiltration and subversion from an oppressive Communist China, the Republic of China in Taiwan has every reason to believe that Communism is a real menace to its security, and that some extraordinary actions could be justified under this special condition. It is clear that laws must be strong and effective to enable the government to protect itself from the dangerous Communist Party. At the same time, we must be careful lest, in an effort to safeguard the government and its principles, we do not blindly destroy them. It is necessary to pass laws and to render judgments which do not take on the character of ex post facto laws, but which are nevertheless strong enough to accomplish the purpose of self-preservation.

In addition, it is clear that the decision on membership of the Communist Party will probably have a negligible effect as a

44. Quoted in Bickel, *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 115 (1961).

deterrent. Most of those people who might otherwise bear the effects of the decision are idealists, and an idea cannot be suppressed simply by legislation or judgment. Such people will join the Communist Party and remain in it unless and until their illusions concerning it are shattered. Only education, not the force of government, can accomplish this. On the other hand, to those ex-Communists who have rejected Communism for a number of years and who now lead an honorable and worthy life, the present Interpretations make no provision for forgiveness; such people may now lose their jobs, their friends, their homes, and maybe even their wives and children simply because they once were members of the Communist Party, whether or not they knew of its illegal purpose when they joined. By these Interpretations a person can express no political opinions without spending the rest of his life in dread of punishment. He can join no organization of any type, no matter how harmless or legal at the time of joining, without being forever afraid that some day in the far distant future, past membership in that organization will be grounds for prosecution.

According to the dissenting opinion of Interpretation No. 129, after more than ten conferences, the Grand Justices had originally decided upon the following criterion: there had to be proof of the ex-Communist's knowledge that the Party had an evil purpose or of his agreement with any such purpose that it might have had and proof that he joined the Party voluntarily.⁴⁵ This reasoning was finally rejected. It reflects, however, a more balanced argument and should serve as the direction to be followed in the future.

2. *Freedom of the Press*

According to the Publication Law, the administrative agency may impose an "injunction" or withdraw a license from a particular publication when a violation occurs. In addition, it may issue a warning, levy a fine, confiscate, and take other measures.⁴⁶ This administrative injunction may last no longer than one year and has to be confirmed first by the Government Information Office of the Executive Yuan.⁴⁷ The Information Department of the Taiwan Provincial Government or Taipei Special Municipality has full discretion for other less serious administrative penalties. Since every

45. See SZU-FA-YUAN TA-FA-KUAN HUI-I CHIEH-SHIH-HUI-PIEN (The Collection of Interpretations Made by the Council of Grand Justices of the Judicial Yuan) 316 (1977).

46. Art. 36.

47. Art. 403(3).

new magazine and newspaper has to be registered at its local government and confirmed by the provincial or Taipei special municipality government before its issuance, the responsibility of enforcing the Publication Law naturally falls to those agencies. The license is issued by the Government Information Office of the Executive Yuan upon confirmation. Thus, only this highest government agency is entitled to withdraw the license of a publication.

Among the grounds for issuing an administrative injunction are those crimes which incite a person to commit offenses against the internal or external security of the state⁴⁸; interference with public functions, voting, or public order⁴⁹; and offenses against morals or religion.⁵⁰ Except for those violations relating to the national security, others have to be rated as serious enough to warrant administrative action.⁵¹ There are only two conditions in which the license may be withdrawn: if someone commits a crime against national security and is thus sentenced, and it can be shown that his criminal act was influenced by a publication, or; if the major content of the publication is punishable for offending against morals and its publishers have already received three administrative injunctions but continue the violation.⁵²

Considering the possible undersirable result of empowering an administrative agency to restrict the freedom of the press which is guaranteed explicitly by the Chinese Constitution,⁵³ the Control Yuan asked the Council of Grand Justices to interpret these related provisions of the Publication Law. The Council avoided the central question of whether they are in conflict with the freedom of press or

48. Offenses against the internal security of the state are the crimes stated in article 100(1) of the Criminal Code which appeared in note 19. Offenses against the external security of the state include those of a person who "communicates with a foreign state or its agent with intent that such state or another state begin war with the Republic of China"; "communicates with a foreign state or its agent with intent to subject territory of the Republic of China to such state or another state"; "discloses or delivers a document, plan, information, or other thing of a secret nature concerning the defense of the Republic of China" to a foreign country and others; *see* art. 103-15, the Criminal Code.

49. Criminal Code, art. 135-41 for the offenses of interference with public function; art. 142-48 for the offenses of interference with voting; and art. 149-60 for the offenses of interference with public order.

50. Offenses against morals were provided for in art. 221-36 of the Criminal Code. Art. 246 is the provision concerning the offenses against religion.

51. Art. 40(3)(4), Publication Law.

52. Art. 41.

53. Art. 11 provides: "The people shall have freedom of speech, teaching, writing, and publication."

not; instead, it skillfully laid the constitutional groundwork for the administrative injunction and for the withdrawal of a license. The "necessity conditions" contained in article 23 of the Constitution were cited to give sanction to these administrative actions. This article provides that: "All the freedoms and rights enumerated in the preceding articles [including freedom of the press] shall not be restricted by law except by such as may be necessary to prevent infringement upon the freedom of other persons; to avert an imminent crisis; to maintain social order; or to advance the public welfare." As for the method of restricting the freedom of the press, the Council simply indicated there is no limitation provided in the Constitution. Furthermore, access to the Administrative Court also is granted for possible infringement of the peoples' right, and this protection is considered adequate by the Council.

Chapter 2 (articles 7-24) of the Chinese Constitution sets forth an impressive array of constitutional rights, freedoms, and ideals. Article eight guarantees personal freedom⁵⁴; article ten deals with the freedom of travel and settling residency; article eleven guarantees freedom of speech, teaching, writing and publication; article fourteen establishes freedom of assembly and association; article sixteen grants the rights of presenting petition, lodging complaints, or instituting legal proceedings. All of these guarantees are, however, explicitly counterbalanced by the possible restrictions under specific

54. It provides: "Personal freedom shall be guaranteed to the people. Except in the case of *flagrante delicto* as provided by law, no person shall be arrested or detained otherwise than by a judicial or a police organ in accordance with the procedure prescribed by law. No person shall be tried or punished otherwise than by a law court in accordance with the procedure prescribed by law. Any arrest, detention, trial, or punishment which is not in accordance with the procedure prescribed by law may be resisted. When a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall in writing inform the said person and his designated relative or friend of the grounds for his arrest or detention, and shall, within 24 hours, turn him over to a competent court for trial. The said person, or any other person, may petition the competent court that a writ be served within 24 hours on the organ making the arrest for the surrender of the said person for trial. The court shall not reject the petition mentioned in the preceding paragraph, nor shall it order the organ concerned to make an investigation and report first. The organ concerned shall not refuse to execute, or delay in executing, the writ of the court for the surrender of the said person for trial. When a person is unlawfully arrested or detained by any organ, he or any other person may petition the court for an investigation. The court shall not reject such a petition, and shall, within 24 hours, investigate the action of the organ concerned and deal with the matter in accordance with law." This is the most lengthy provision in the Constitution. Its detailed prescription reflects the heavy emphasis which its drafters placed upon it.

necessary conditions provided in article 23 as mentioned above.⁵⁵ There can be no doubt that the Chinese Constitution was based on respect for the individual. But one must bear in mind that this emphasis need not imply nor does it manifest itself in the term of individualism as understood in the United States. "Almost all modern nations at least pay lip service to guarantees of human rights. But there are significant differences in what people mean by freedom in different cultural, political and academic worlds and in the ways they integrate freedom and consciousness of rights with law and public interest consciousness. These cultural factors, in turn, affect enforcement policy and judicial thought and behavior patterns."⁵⁶

Traditionally, as we mentioned in Chapter II, the Chinese people have stressed social concerns, rather than individualism.⁵⁷ This remains true today. "Opposition to the public good or to group consensus in favor of assertion of individuality is viewed as unprincipled and reprehensible egotism. Freedom traditionally, and also literally, meant the freedom to behave as one pleased without considering others and was thus abhorred by the general public."⁵⁸ This conception of freedom continues to affect the contemporary Chinese perception of the relationship between the values of law and the individual. The fulfillment of one's duties according to one's place in the status hierarchy under Confucian teaching, rather than the recognition of the rights and fulfillment of the goals of the individual person, was pervasive and imperative. Indeed, there was no word for a "right" existing in the Chinese language until the intercourse with

55. The imposition of legal restraints upon the constitutional rights of the individual is not limited to the Chinese Constitution. Basic Law for the Federal Republic of Germany, art. 2, provides: "Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code." For other similar restrictions, see art. 5(2), art. 9(2), art. 18. Article 12 of the Constitution of Japan provides: "The freedom and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavour of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for public welfare." As for the enumerated civil rights, their exercise may also be limited for the public welfare. For example, art. 22 provides: "Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare."

56. Been, *The Public Welfare Standard and Freedom of Expression in Japan*, in the CONSTITUTION OF JAPAN 209-210 (D. Henderson, ed. 1968).

57. At 35-38.

58. Been, *Freedom of expression in Japan with Comparative Reference to the United States*, in COMPARATIVE HUMAN RIGHTS 99, 101 (R. Claude ed. 1976). What he said about the Japanese culture on this point also applies to Chinese culture.

the West in the late nineteenth century. "In such a context, self-realization is achieved by fulfilling duties to others with a correlative expectation that others will do likewise. This mutual awareness is of diffuse, interpersonal responsibilities, rather than of clearly and narrowly defined duties, as in American law."⁵⁹ Even though the West recognizes the notion of "duty," it does so in a somewhat negative way; "to do something because it is a duty is often thought to indicate that the action is not done freely, but because one has to."⁶⁰

Under this traditional influence it is not surprising to find that even though all the constitutionally guaranteed rights were enumerated together, these rights are still not as significant as the four specific necessary conditions in article 23. Surely this provides a safe shield for the government from attacks made by civil rights groups.⁶¹ Almost without exception, any specific restrictive statute would be held constitutional if it were challenged in the Council of Grand Justices. It is, of course, admitted that the Council should not, under the guise of judicial review, usurp legislative power and that, accordingly, in some areas it should not examine a legislative choice of means. There is, however, a vast difference between the latter type of judicial self-restraint and the abstention from judicial review that has characterized the Council of Grand Justices.

It is recognized that one of the basic principles of the Western idea of the rule of law is that one whose legal rights have been violated by an administrative action may challenge the legality of that action in a court of justice. But the Chinese Constitution explicitly distinguishes administrative actions from civil and criminal suits, and an Administrative Court has thus been established.⁶²

The Republic of China is not the first country with a separate administrative court; this separation originated in France. Before the revolution, France had an unhappy history of judicial interference

59. *Id.*, at 102.

60. *Id.*, at 104.

61. The public welfare clauses in the Japanese Constitution have often been utilized by the Japanese Supreme Court as the counterbalancing weight on the scale against the specific constitutional freedom at issue, and their use is concluded by Professor Masami Ito as a "panacea for curing the alleged unconstitutionality of the law." See *The Rule of Law: Constitutional Development* in *LAW IN JAPAN* 205, 229-30 (A. von Mehren ed. 1963).

62. Article 77 provides: "The Judicial Yuan . . . shall have charge of civil, criminal, and administrative cases. . . ." The Organic Law of the Judicial Yuan further elaborated this by providing in art. 7: "Judicial Yuan shall establish Supreme Court, Administrative Court. . . ."

with administrative process in general and the obstruction of necessary administrative reforms in particular. Judges attempted to conserve their own privileges and prerogatives. This succeeded in fixing in the French mind a deep-rooted antipathy for judicial expansion and a strict interpretation of the theory of separation of powers. This resulted in the establishment of a specialized administrative court independent of the regular judicial hierarchy and possessed of the exclusive power of adjudication with respect to administrative acts.⁶³ Several other European countries including Germany, Italy, and Austria, have adopted a similar system since that time. In short, this separation has prevailed in civil law countries. As the judicial system of the Republic of China was heavily influenced by the pre-war Japanese system, which in turn was modeled after the German, it is not surprising that an independent administrative court was established.

In addition to the existence of such attitudes as revulsion and distrust on the part of the administrators toward the judiciary, there also are some fundamental differences between administrative and regular civil or criminal adjudication. The nature of administrative adjudication is such that it cannot be separated from the public power of the bureaucracy. Furthermore, the exercise of administrative power sometimes involves broad discretion. Hence, situations may arise when it becomes necessary to bend private interests in favor of public interest. When such a necessity arises, it is not always apparent to regular judges. Therefore, it is claimed that administrative suits should be heard by those who are intimately versed in matters of administration.⁶⁴

Since administrative agencies carrying out measures by virtue of their official function were under the authority of the Constitution and the law, lawyers from civil law countries further argued that the agency's executive efficacy would be penalized as a result of subordination to judicial functionaries, especially if administrative

63. For detail, see B. SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD* 1-18 (1954). As for the desirability of introducing certain French standards of administrative control in the United States, see Cake, *The French Conseil d'Etat — An Essay on Administrative Jurisprudence*, 24 AD. L. REV. 315-24 (1972). Indeed, the Task Force of the Second Hoover Commission in the United States urgently suggested some form of administrative court system for the United States federal government; see H. ABRAHAM, *supra* note 12, at 269.

64. When the United States recognized the merit of the administrative court system, the Court of Claims was established in 1855 and the Tort Claims Act of 1946 was passed which, under certain circumstances, made the government responsible for the actions of its servant being tried in a specialized court.

measures were placed under the control of a judiciary charged with the duty of deciding whether a particular administrative action was legal or illegal, proper or improper.⁶⁵

A characteristic of the Chinese tradition also contributes to the adoption of a separate administrative court system. Historically, when citizens pressed for relief from infringement of their rights by public officials, or when they sought to restore their rights or to defend their interests, almost the only recourse open to them was to draw up a petition. Through the system of memorials, the people's requests were heard and decided by a responsible public agency or by its superior through internal administrative supervision. This process provided an opportunity for the administrative agency to correct its mistake and thus avoided the possibility of embarrassment resulting from a public trial. In fact, since both administrative and judicial functions were exercised by local magistrates alone, it was simply impossible to bring suit against the government in court. This initial internal proceeding today has been formally incorporated into a statute. Before presenting a suit to the Administrative Court, one generally has to make an administrative appeal and re-appeal to the competent higher authorities.⁶⁶

There is no doubt that through this procedure the burden of the Administrative Court has significantly been reduced. However, it may also be attended with some undesirable results. Under this system the challenged administrative act is reviewed by the very administrative agency which issued the particular administrative act, or by its supervising administrative authority. In either case, the reviewing agency can hardly be expected to make an unbiased decision.⁶⁷ Moreover, the appeals and re-appeals are generally handled

65. See B. ITO, *COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN* 120-21 (1978).

66. In addition to appeals grounded in a dissatisfaction with the decision of re-appeal, a person is also entitled to bring action to the Administrative Court if the competent authority hearing his re-appeal fails to make a decision within three months after the institution. This is significant in view of the prevalent problem of case delay in the court; see Art. 1 (1), *The Law of Administrative Proceedings*. A similar procedure also exists in West Germany. A prospective plaintiff has to follow a "remonstrance" procedure, or an "appeal" (*Widerspruch*) to the administration before applying to an administrative court, and this takes place before higher administrative authorities; see Z. NEDJATI & J. TRICE, *ENGLISH AND CONTINENTAL SYSTEMS OF ADMINISTRATIVE LAW* 46 (1978).

67. Taking the period of 1970-1973 for example, the percentage of dismissed appeals initiated by people was always above 70 percent. The percentage even goes higher than 80 percent in the re-appeal decision. These data were provided by the Committee of the Review of the Administrative Appeal in the Executive Yuan.

by ordinary administrative officials who have not necessarily had proper legal training, and regular trial procedure is not carefully followed. The people are not assured the right to be heard, although the reviewing agency might conduct an oral trial in its own discretion.

The Administrative Court also has some defects. First, although security of tenure was provided for judicial judges directly in the Chinese Constitution, there was no similar provision for Administrative Court judges, who were covered only by statute. Consequently, the position of an administrative judge could be altered merely by changing the law. Second, since only one Administrative Court has been established, it has the function of hearing an administrative suit only once. Individuals' rights can hardly be expected to receive adequate protection. Third, since the creation of the Administrative Court was influenced by a strong bureaucratic tradition (this assumption can be substantiated by the cases of Germany and pre-war Japan), the administrative judges were favorably disposed toward the executive and not inclined to protect the rights of the people. In other words, the Administrative Court, as it turned out, frequently served as a part of the bureaucracy that explained, defended and justified the legality of administrative dispositions to the people. Accordingly, its underlying purpose, that of providing relief from the exercise of administrative power which infringed upon the rights and liberties of the people, has been largely ignored by the Administrative Court. This may be evidenced by the fact that the rate of dismissal has never been below 80 percent since 1959.⁶⁸ The bureaucratic mentality of judges of the Administrative Court is the major factor underlying the proliferation of like members. The ratio of persons with administrative background often surpassed those with judicial background. Moreover, in terms of career advancement, it is suggested that the assignment of judicial officers or high-ranking administrative officials to the Administrative Court has generally not been looked upon with favor. Therefore, the caliber of the Administrative Court cannot be compared favorably to that of the Supreme Court.

Since the major function of the Administrative Court is in practice to justify the legitimacy and lawfulness of the administrative authority's initiatives rather than to assure citizens' rights, the responsibility imposed upon it to protect those constitutional civil

68. See Chen, *The Administrative Adjudication over the Past Twenty Years*, in FA-LIN-YUEH-KAN ERH-SHIH-CHOU-NIEN CHI-NIEN LUN-VAN-CHI, *supra* note 25, at 415, 416.

rights can hardly be expected to have been met. The remedy for this inadequacy lies not in the abolition of the system of administrative adjudication and the transferring of its jurisdiction to a regular court, as in the case of the United States, but in the meaningful improvement of its structure and procedure. If all those who handled the administrative cases had sufficient legal training in addition to their administrative experience and if the procedures were conducted with more judicial flavor, such as the extensive use of oral argument and amending the single-instance system in favor of a two-instance system in the Administrative Court, the output might possibly be different.

About two years before the Interpretation No. 105 made by the Counsel of Grand Justices, the United States Supreme Court first held that, by virtue of the first amendment itself, courts are the only body competent to decide whether an administrative action is constitutional. Central to this case was whether a judicial or administrative determination on the restriction of the freedom of the press was desirable. The facts of the case, *Manual Enterprises, Inc. v. Day*,⁶⁹ can be summarized as follows: a publisher of magazines consisting principally of photographs of nude and semi-nude males and intended for homosexuals brought an action for injunctive relief against the Postmaster General who had ruled that the magazines in question were non-mailable under the Comstock Act.⁷⁰ The district court gave summary judgment for the Postmaster General, and the court of appeals affirmed on the ground that the magazines were obscene and contained advertisements for obscene materials.

In a six-to-one decision, the Supreme Court set aside the post office's action. There was, however, no opinion of the Court. Mr. Justice Brennan, joined by Chief Justice Warren and Mr. Justice Douglas, concluded that the administrative procedure through which the publications were declared nonmailable was not authorized by Congress,⁷¹ and a contrary conclusion would raise, *inter alia*, the

69. 370 U.S. 478 (1962).

70. 18 U.S.C. § 1461 (1958), which provides: "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance . . . [and an advertisement of such matter] is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. . . ." The statute goes on to prescribe criminal penalties for violation. The statute's popular name derives from Anthony Comstock, the Victorian reformer who was mainly responsible for its passage in 1873.

71. Several scholars supported this rationale even before the case was decided. See, e.g., Paul, *The Post Office and Non-Mailability of Obscenity: An Historical Note*, 8 U.C.L.A. L. REV. 44 (1961); Schwartz, *Obscenity in the Mails: A Comment on Some*

substantial constitutional question of "whether Congress, if it can authorize exclusion of mail, can provide that obscenity be determined in the first instance in any form except court,"⁷² without violating the First Amendment.

The obvious implication of Mr. Justice Brennan's opinion is that, in order for the Postmaster General to ban an article from the mails, it would be necessary for there to be an action in court against the publication in question, and only upon a judicial determination of obscenity could an administrative restriction be imposed. Apparently, this also holds true for any other administrative agency. In addition, since we can find nothing in the rationale of *Manual Enterprise* to suggest that its principle is confined to the area of obscenity, political speech should be treated similarly. As a matter of fact, the necessity for a disinterested judicial judgment is even greater in this area.

The preference for judicial evaluation rests in the inherent institutional differences between courts and administrative agencies no matter how judicial the administrative proceedings may be. There are several reasons for this attitude. First, the security of tenure, in principle at least, frees judges from direct political pressure. Judicial insulation encourages impartial decision-making. An administrative agency is rarely insulated as the court. Second, the role of the administrator is not that of the impartial adjudicator, but of the expert — a role which necessarily gives an administrative agency a narrow and restricted viewpoint. On the other hand, courts have a broader perspective resulting from their general jurisdiction. They deal daily with a wide variety of situations; their broad experience helps eliminate the deficiencies that come from single-mindedness.⁷³ Third, an adversary proceeding in the court sharply reduces the chances of an erroneous injunction. At such a proceeding the judge will not only receive a more accurate description of the relevant facts, but his attention will also be directed to the relevant legal principles.

Manual Enterprises has further significance. The plaintiff, before litigating in the lower federal court, had already been given an evidentiary hearing before the Judicial Officer of the Post Office Department. It might be claimed that this internal administrative supervision almost amounted to the appeal procedure in the Chinese administrative process. After that, the differences begin. In contrast

Problems of Federal Censorship, 106 U. PENN. L. REV. 214 (1957); Zuckerman, *Obscenity: In the Mails*, 33 SO. CAL. L. REV. 171 (1960).

72. 370 U.S. at 497-98.

73. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 522-23 (1970).

to the American practice in which the plaintiff may have as many as three opportunities to argue his case before a comparatively impartial regular court, the Chinese plaintiff can only present his complaint to a higher administrative agency and finally to the Administrative Court, which always reflects a strong pro-government attitude. The protection provided under the American system is far more complete than that under the Chinese. Of course, the dissatisfied plaintiff in China still can as a last resort file his case with the Council of Grand Justices. But his chance of success is not very bright in view of the Council's rigid procedure as well as the extreme conservatism evidenced by its record.

In addition to the constitutionality of the administrative procedure involved in Interpretation No. 105, the administrative temporary injunction and withdrawal of license employed by the Chinese government to regulate the business of publication has additional significance. Both were used to prevent a magazine's further publication because of previous performance. Do they amount to "prior restraint" of the freedom of the press? Or do they merely constitute subsequent punishment? What is the real difference between them? Is the freedom of the press absolute? If not, under what condition may a "prior restraint" be imposed without violating the Constitution? These questions are analyzed in the following paragraphs.

It is well settled that one necessary condition of the democratic process is the free interchange of ideas. The right to communicate ideas is as important in a democracy as any other civil right — whether the communication taking place is in spoken or written form. "Democratic government," wrote Bryce, "rests upon and requires the exercise of a well-informed and sensible opinion by the great bulk of the citizens."⁷⁴ This can be further evidenced by the fact that a censored press has always been the hallmark of the despot. On the other hand, one cannot help asking if this freedom is absolute. If not, what limits are to be placed on publications?

There are, in general, two ways in which governments may deny freedom of the press. One is by prior legal limitations which prohibit or otherwise effectively restrain speaking or publication. A system of prior limitations is essentially a system of censorship, by license or otherwise, that operates before the fact. The other method is by legal proceedings that punish persons for speech or a publication which is alleged to violate statutory standards. In short, this is the distinction between censorship of speech and punishment for the abuse of speech.

74. I.J. BRYCE, *MODERN DEMOCRACIES* 109 (1921).

These two methods have commonly been referred to as "prior restraint" and "subsequent punishment."

Because some characteristics of prior restraint make it more dangerous to freedom of the press than subsequent punishment, the practice of prior restraint has always been viewed unfavorably. As Thomas J. Emerson indicated, "under a system of subsequent punishment, the communication has already been made before the government takes action; it thus takes its place, for whatever it may be worth, in the market place of ideas. Under a system of prior restraint, the communication, if banned, never reaches the market place at all."⁷⁵ In other words, in both cases the social interest in the advancement of truth is involved; subsequent punishment affords an opportunity to distinguish between that which contributes to the policy of open communication and that which in no way contributes to it. The imposition of prior restraint necessarily shuts out the true as well as the false. Because prior restraint is purported to be done indiscriminately and is not limited to particular cases which are the subject of complaint, the possibility of abuse is much greater and the area affected also will be more extensive. Furthermore, it is easier to impose prior restraint, for it requires only an administrative decision which can often be made behind a screen of informality and partial concealment, whereas subsequent punishment is a time-consuming, expensive, and public process involving compliance with the protective safeguards of criminal prosecution. Last, but not least, the danger posed by prior restraint is that the force contained within this system may drive it toward unintelligent, overzealous, and often absurd administration. The ability and personality of those persons in charge of administering prior restraint may be best summarized in the words of Milton:

If he be of such worth as behooves him, there can not be a more tedious and unpleasing journey-work, a greater loss of time levied upon his need, than to make the perpetual reader of unchosen books and pamphlets . . . we may easily foresee what kind of licensors we are to expect hereafter, either ignorant imperious, and remiss, or basely pecuniary.⁷⁶

Moreover, the nature of the administrators' work is to find something to suppress; they cannot be expected to act as disinterested judges.

75. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMPORARY PROBLEMS 648, 657 (1955).

76. J. MILTON, AREOPAGITICA 20-21 (E. Rhys ed. 1927).

Their careers depend upon the record they make. It thus is quite natural that they view anything with a high degree of suspicion. This unhealthy attitude is certainly not conducive to protecting the freedom of the press.

Although the danger of prior restraint has generally been recognized, the rule against it did not develop in the West until the seventeenth century.⁷⁷ Prior to that time the Crown in England exercised the prerogative of licensing the press. Seditious and heretical books were prohibited, and licenses were required for printers, importers of books, and booksellers. The number of master printers was limited, and they were licensed and bonded.⁷⁸ In 1695 the last enactment providing for official censorship of the press came to an end. Although the licensing law has not since been renewed, the law against seditious libel and blasphemy remained unaffected and has been applied as a basis for subsequent punishment.⁷⁹ Because the American colonies were established during the period when England practiced the licensing system, it is not surprising to learn that Americans adopted the main features of the English censorship system in their early history. However, these laws were abolished completely in the first half of the eighteenth century.⁸⁰

The press's freedom from licensing then came to assume the status of common law or natural right. Blackstone stated concisely in 1791 that

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay

77. For an historical development of this licensing law, see 6 W. HOLDSWORTH, *HISTORY OF THE ENGLISH LAW* 360 (1924). It is interesting to note, however, that the popular feeling against the curtailment of a free press was not generated by a realization of the importance of the freedom of press. It was generated by "the petty grievances, the exactions, the jobs, the commercial restrictions, the domiciliary visits which were incidental to it" and which resulted in the struggle for the freedom of press. 4 T. MACAULAY, *THE HISTORY OF ENGLAND* 13 (1879).

78. For details, see G. PATTERSON, *FREE SPEECH AND A FREE PRESS* 17-51 (1939); Holdsworth, *Press, Control and Copyright in the 16th and 17th Centuries*, 29 *YALE L.J.* 841 (1920).

79. See Harvey Kelley, *Some Constitutional Aspects of Statutory Regulation of Libels on Government*, 15 *TEMP. L.Q.* 453, 454-62 (1941); Shientag, *From Seditious Libel to Freedom of the Press*, 11 *BROOKLYN L. REV.* 125 (1942).

80. PATTERSON, *supra* note 78, at 104-15; Vance, *Freedom of Speech and of the Press*, 2 *MINN. L. REV.* 239, 247 (1918).

what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.⁸¹ (Emphasis added).

This theory was also adopted by the United States, which incorporated it into the first amendment. However, this concept of freedom of press evidently implied the possibility of subsequent punishment of publications, which generated some concern among scholars. It has been termed too narrow in that it offered no protection from a reckless criminal prosecution instituted against a harmless publication. As one writer said, "a death penalty for writing about socialism would be as effective suppression as censorship."⁸² Accordingly, for the sake of greater certainty, some have gone further by favoring a licensing system; under such a system a publisher could be informed in advance of what is permitted and what is forbidden, thus obviating the danger of criminal or similar sanctions in the event that his interpretation of the law is erroneous.⁸³ Nevertheless, when we consider the public interest in the long run, this argument that prefers prior restraint to subsequent punishment is obviously undesirable.

The danger of allowing excessive subsequent punishment to endanger freedom of the press has clearly been recognized by the United States Supreme Court. In *Schenck v. U.S.*,⁸⁴ the Court somewhat modified Blackstone's definition by declaring that "It may well be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose. . . ."⁸⁵

Although the doctrine that no previous restraint of publication can be imposed under the first amendment existed for a long time, it was not until 1931 that the Supreme Court vigorously and effectively enunciated and gave substantive meaning to what had been hitherto merely a concept. The statute before the Court in *Near v. Minnesota*,⁸⁶ the so-called Minnesota Gag Law,⁸⁷ provided that

81. B.L. COMM. 151-52.

82. Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 10 (1942).

83. See Emerson, *supra* note 75, at 659.

84. 249 U.S. 47 (1919).

85. *Id.*, at 51.

86. 283 U.S. 697 (1931).

87. MINN. STAT. (Mason, 1927) §§ 10103-1 to 10123-3.

Any person who . . . shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away (a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or (b) a malicious, scandalous and defamatory newspaper, magazine or other periodical, is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined. . . ."

The articles published by the appellant, a newly established weekly paper called *The Saturday Press*, charged that a Jewish gangster was in control of gambling, bootlegging, and racketeering in Minneapolis, and that law enforcement officers and agencies were not energetically performing their duties. The charges were made in a crude and distasteful manner. The state court, after finding that the publications constituted a "nuisance" within the statute, first temporarily restrained the defendants from further publishing and later perpetually enjoined them from issuing "any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law."⁸⁸

Mr. Chief Justice Hughes, speaking for the majority, analyzed the operation and effect of the statute and concluded that it effectively amounted to censorship. He pointed out, "The statute provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication."⁸⁹ Adopting Blackstone's theory that this freedom of the press means "principally, although not exclusively, immunity from previous restraints or censorship," Justice Hughes recognized that he who abused the right was responsible criminally for the public and civilly for the private wrong. "The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuse as may exist is the appropriate remedy, consistent with the constitutional privilege."⁹⁰

The four dissenting Supreme Court Justices, speaking through Mr. Justice Butler, characterized the decision as giving to the freedom of the press "a meaning and a scope not heretofore recognized." It was contended that there was no authorization of administrative control in advance, but only prescription of an

88. 283 U.S. at 706.

89. *Id.*, at 712.

90. *Id.*, at 720.

equitable remedy, enjoining the continuance of a business. Since the publisher was held liable and punished only when he continually committed some prior misconducts, the statute, theoretically, could hardly be said to set up prior restraint instead of subsequent punishment.

This aspect of *Near v. Minnesota* appears also in the Chinese system as articulated in its Publication Law. An administrative temporary injunction and the withdrawal of a license have historically been applied only after a questionable publication had appeared. Issuance of such orders was thus based on the past performance of a particular newspaper or periodical. However, when we consider the actual operation of these procedures and their resulting effect on the press, they must be labeled as serious prior restraints. Punishment was summarily dispensed by administrative officials without any other of the protections provided in ordinary criminal cases. The situation is better in the United States, because a judge assumes the responsibility. But even in the United States there is no jury trial and other procedural safeguards are also absent. Therefore, it is natural that "under such circumstances any publisher seeking to avoid prison would, in sheer self-protection, have to clear in advance any doubtful matter with the official wielding such direct, immediate, and unimpeded power to sentence. The judge would, in effect, become a censor."⁹¹

The importance lies in the fact that, though there is no restraint before the publication is issued, there are prior restraints as to future issues. Such restraints are not directed at a particular wrongful passage, but at the entire life of the newspaper or periodical. They tend to suppress protected as well as unprotected speech. Thus, the severity in the traditional concept of prior restraint also appears in the case of subsequent restraints. Accordingly, the power to enjoin subsequent issues of a periodical because of misconduct in previous issues in effect becomes a prior restraint of the sort forbidden by the First Amendment in the United States.

Although freedom from prior restraint through censorship now is part of the freedom of the press, this general principle of freedom may have to give way in the United States in certain special circumstances. In some exceptional cases, prior restraint would have been recognized. Plato emphasized the need of protecting the masses from unpleasant truths and the "immoral" lies of poets.⁹² In American

91. Emerson, *supra* note 75, at 654.

92. See Sigler, *Freedom of the Mails: A Developing Right*, 54 GEO. L.J. 30 (1965).

constitutional history, Mr. Chief Justice White wrote in 1918: "It suffices to say that, however complete is the right of the press to state public things and discuss them, the right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrongdoing."⁹³ Mr. Chief Justice Hughes in *Near v. Minnesota* also pointed out that the protection even as to prior restraint is not absolutely unlimited.⁹⁴ Obscenity, the security of the community from incitements to acts of violence, the overthrow of the government by force, and certain other obstructions and publications during time of war were listed as instances where prior restraint could be imposed.⁹⁵ These four exceptional situations are almost comparable to those enumerated offences that warrant the imposition of prior restraint provided in article 32 of the Chinese Publication Law.

When comparing the Chinese practice with that of the United States, we must bear in mind that until 1949, China had been a country without the concept of freedom of the press, similar to England before 1695 and the United States before the First Amendment in 1781. In 213 B.C. the so-called "First Emperor of the Chin Dynasty," Shi Hwang-ti, burned nearly all the books in China in order to wipe out old ideas and old loyalties. When crude wooden blocks were invented for reproducing manuscripts in China about 868 A.D., six hundred years before Gutenberg, the Chinese dynasties captured the press and used it for their own purpose. The most notorious case happened in the Ching dynasty, the last dynasty in Chinese history. It determined to rewrite a "good" history, created an index of "bad" history books, and murdered seventy historians for compiling an honest non-Manchu story of the past. One of the most ruthless literary inquisitions occurred in 1776, the year the Declaration of Independence was created in the United States. A Chinese emperor, Chien-lung, staged a national literary bonfire.⁹⁶ Accordingly, the freedom of the press was a recent doctrine introduced by westerners along with other democratic ideas into China. The period of its taking root and further growth has been so short that it is difficult to reap its fruit. The consciousness of this constitutional right has been developed neither among the public officers nor among the people.

93. *Toledo Newspaper Co. v. U.S.*, 24 U.S. 402, 419-20 (1918).

94. 283 U.S. at 716.

95. *Id.*

96. See generally, Y. LIN, A HISTORY OF THE PRESS AND PUBLIC OPINION IN CHINA (1936).

Another fact that should not be ignored is that the Republic of China at Taiwan has always declared itself to be at war against the People's Republic of China. In addition to the futile invasion on October 25, 1949, there have been two extensive artillery barrages on Quemoy, an offshore island off the mainland, in 1958 and 1960, respectively. Until recently Communist China conducted even-day firings on this and other nearby islands. Although there have been several peaceful offers by the Chinese Communists to unify Taiwan with the mainland, the use of force never has been excluded. Therefore, the possibility of violence has tainted all the peaceful gestures of the People's Republic. In view of the geographical proximity to the mainland and of the fact that, by their own admission, the Communists have sent saboteurs and other agents to Taiwan⁹⁷ (it is understandable that entering a relatively open society in Taiwan is much easier than vice versa) to aid in a Communist takeover, the government of the Republic of China can justify its imposition of some restraints upon the freedom of the press even though it is not engaged in an actual war. After all, self-preservation is as much the first law of the nature of governments as it is of the nature of individuals.⁹⁸ Destruction of a government might result in the loss by its citizens of all individual rights and liberties. Since the Chinese Communists have always been considered the epitome of political despotism, the Taiwan government remains ever cautious, viewing the unification of China with its untoward results to be conceivable.⁹⁹ Therefore, the strict distinction between war and peace has been blurred in Taiwan. After all, the older definition of armed

97. After the so-called re-opening of China in 1971, the Chinese Communist Party and the State Council respectively established "The Taiwan Office" and "The Taiwan Unit," and branch offices were also formed in coastal Fukin and Kwangtung Provinces as well as in Hong Kong and at the PRC's Embassy in Japan. The main plausible purpose for these units is to speed efforts to topple the ROC government and bring Taiwan back under Communist control. See Chen, *Pekings' Attitude Toward Taiwan*, 17 ASIAN SURVEY 903-18 (1977).

98. Along with the American participation in World War I came the Espionage Acts of 1917 and 1918. However, they have elicited much criticism. For texts, see 40 Stat. 217, 553. For a detailed analysis of the background of these statutes and the cases under their influence, see E. HUDON, *FREEDOM OF SPEECH AND PRESS IN AMERICA* 44-68 (1963); CHAFEE, *supra* note 82, at 36-107.

99. Tibet is a vivid precedent. After granting local autonomy and promising not to alter the existing political system in 1951, Communist China cracked down ruthlessly on the resistance movement only eight years later; some even referred this suppression as a crime of genocide. See INTERNATIONAL COMMISSION OF JURISTS, *TIBET AND THE CHINESE PEOPLE'S REPUBLIC* 10-63 (1960).

invasion has become obsolete in an age of jet bombers and nuclear bombs. It may be too late to restrict people's freedom for the protection of national security after a full-scale war has broken out.

Because the Republic of China is confronting not an internal democratic movement of socialists and pacifists who believe in social change by persuasion, but a tightly organized external power which has no intention of confining its efforts to a democratic process, some utterances have to be suppressed. However, action must be in proportion to the emergency. Also, it cannot be denied that there are strong incentives for administrative officials to suppress views in order to cover up mistakes or discourage hostile inquiries. Therefore, while recognizing the necessity of imposing some kind of prior restraint upon the freedom of the press, a strong and independent system of judicial review has to be established as a brake on the possible excessiveness of the administrative authority.

3. *Immunity of Legislative Speech*

The Council of Grand Justices rendered an important decision dealing with the immunity or privilege of a legislator's speech in 1967. It read as follows: "There was no provision in the Constitution to safeguard the speech made by local councilmen at their session. The Interpretation No. 3735 rendered by Judicial Yuan did not contravene the Constitution." The Constitution specifically provided the protection of freedom of speech for members of the National Assembly,¹⁰⁰ Legislative,¹⁰¹ and Control Yuans.¹⁰² But all of these bodies are national agencies. The reason for the omission of local bodies has not been spelled out. A tragedy occurred in 1947 and resulted in Interpretation No. 3735 made by the Judicial Yuan (the Council of Grand Justices had not been established at that time). It was begun by a rejected proposal of a councilman in Sui County, Hupei Province, to a woman teacher. Bearing a grudge against her, he uttered in the county council that she was an unlicensed prostitute in order to discredit her. Angered and ashamed by this groundless accusation, the woman teacher committed suicide and left a posthumous letter stating the true facts as well as hoping that the

100. Article 32: "No delegate to the National Assembly shall be held responsible outside the Assembly for opinions expressed or votes cast at a meeting of the Assembly."

101. Article 73: "No member of the Legislative Yuan shall be held responsible outside the Yuan for opinions expressed or votes cast in the Yuan."

102. Article 101: "No member of the Control Yuan shall be held responsible outside the Yuan for opinions expressed or votes cast in the Yuan."

councilman responsible would be put on trial for slander. Based on the application from the Hupei provincial government, the Judicial Yuan decided in Interpretation No. 3735 that the challenged statements must bear a relation to legislative matters before the meeting; otherwise the speaker could be held liable for libel or slander.

Since the Interpretation was issued before the promulgation of the current Constitution and since both the current Organic Laws of the Provincial Assembly and County Council have provided explicitly that "No member shall be held responsible outside for opinions or votes cast at session,"¹⁰³ a problem arises in determining the precise scope of this legislative immunity at the local level. The facts surrounding the present decision of the Council of Grand Justices are somewhat similar to those of Interpretation No. 3735. A councilman in the Taitung County Council interpellated the county government about the fact that a personnel official in the Taitung Health Bureau had coerced a woman subordinate for an appointment. The accused person filed suit against the councilman for libel. The Control Yuan received the petition from the Taitung County Council and referred it to the Council of Grand Justices for a decision.

The doctrine of legislative immunity had its origin in the Parliament's struggle for supremacy over the King of England during the 16th and 17th centuries.¹⁰⁴ Members of Parliament often found themselves confined to the Tower of London for what they had said in Parliament. After one king was beheaded and another was exiled to France, the privileges of speech or debate were guaranteed for members of Parliament in the English Bill of Rights of 1689, which provided: "That the Freedom of Speech, and Debates of Proceedings in Parliament, ought not be impeached or questioned in any Court or Place out of Parliament."¹⁰⁵ Although the existence of the parliamentary privilege of freedom of speech and debate was never again

103. Article 33 of the Organic Law of Taiwan Provincial Assembly; article 40 of the Organic Law of County Council in Taiwan Province.

104. For detailed historical background, see E. MAY, *THE LAW, PRIVILEGES, PROCEDURES AND USAGE OF PARLIAMENT* 67-115 (1976); Z. CHAFEE, *THREE HUMAN RIGHTS IN THE CONSTITUTION* 6-83 (1956); Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK L. REV. 1, 3-16 (1968); Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1120-44 (1973); Yankwich, *The Immunity of Congressional Speech — Its Origin, Meaning and Scope*, 99 U. PENN. L. REV. 960 (1951).

105. CHAFEE, *id.*, at 7.

seriously questioned in England, its proper scope and application were issues in numerous cases that followed. In the case of *Stockdale v. Hansard*, the English court set forth a classic description of the scope of the parliamentary privilege of freedom of speech and debate as it had developed:

By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity.¹⁰⁶

This frequently quoted dictum was reinforced by the decision in *Ex Parte Wason*.¹⁰⁷ As Mr. Justice Lush of the Court of Queen's Bench stated: "I am clearly of the opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House."¹⁰⁸ Accordingly, it is safe to conclude that the immunity conferred by this privilege against libel and slander is absolute without any qualification in England.

Since this principle was so firmly rooted, the drafters of the American Constitution adopted it in article I, section 6, without much debate.¹⁰⁹ The language contained in this clause restricts the privilege to "any Speech or Debate in either House," which, taken literally, would appear only to immunize those statements made on the floor of the Congress. However, the immunity of legislators has not been confined by the courts to acts performed on the floor of the chamber concerned. James Wilson, a member of the Convention's Committee on Style, represented the prevailing view that

in order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary that he should enjoy the *fullest liberty of speech*, and that he should be protected from the resentment of

106. 112 Eng. Rep. 1112, 1156 (Q.B. 1839).

107. 4 Q.B. 573 (1869).

108. *Id.*, at 577.

109. *United States v. Johnson*, 383 U.S. 169, 177 (1966); Reinstein & Silverglate, *supra* note 104, at 1138-40.

every one, however, powerful, to whom the exercise of that liberty will occasion offence."¹¹⁰ (Emphasis added)

The first and leading American decision interpreting the privilege is *Coffin v. Coffin*.¹¹¹ In this case, Chief Justice Parsons of the Massachusetts Supreme Court construed the defendant legislator's defamatory statements, which were made in a private conversation about matters not then before the House, as outside the legislative function. The defendant was therefore not entitled to the defense of privilege. Justice Parsons, however, declared unequivocally a rather broad doctrine of legislative immunity:

I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution of the office.¹¹²

The first speech or debate clause case to reach the Supreme Court was *Kilbourn v. Thompson* in 1881.¹¹³ The defendant sued several members of the House of Representatives and the House Sergeant at Arms for his imprisonment resulting from his refusal to produce certain documents before a congressional investigation committee. Citing *Coffin* as the most authoritative case, the Court enunciated the scope of the privilege as extending "to things generally done in a session of the House by one of its members in relation to the business before it,"¹¹⁴ even declaring that ordering Kilbourn's imprisonment had exceeded the authority of the House.¹¹⁵

It would seem, then, from the Court's definition of the scope, that the speech or debate privilege had been given a somewhat expansive reading. However, its scope was further extended into an absolute one in the first half of the century by the American court. In 1931, *Cochran v. Couzens*¹¹⁶ was decided by the Court of Appeals for the District of Columbia and the Supreme Court declined to take review.¹¹⁷ It held that defamatory words uttered by a United States

110. 1 THE WORKS OF JAMES WILSON 421 (R. McCloskey ed. 1967).

111. 4 Mass. 1 (1808).

112. *Id.*, at 27.

113. 103 U.S. 168 (1880).

114. *Id.*, at 204.

115. *Id.*, at 189.

116. 42 F.2d 783 (D.C. Cir. 1930).

117. 282 U.S. 874 (1930).

Senator on the floor of the Senate in the course of a speech, but not in the course of debate, whose subject matter did not concern any matter under inquiry by the Senate, were nevertheless absolutely privileged under article I, Section 6 of the Constitution and could not be made the basis for an action of slander in any court. The Court of Appeals stated:

It is manifest that the framers of the Constitution were of the view that it would best serve the interests of all the people if members of the House and Senate were permitted *unlimited freedom in speeches and debates*.¹¹⁸ (Emphasis added)

Because the issue before the Chinese Council of Grand Justices related to a local legislative body, it is important to explore its counterpart in the United States. All but seven state constitutions provide immunity for state legislators similar to that of article I, section 6.¹¹⁹ Absolute privilege has not applied solely at the federal level; courts have held it applicable both to the state¹²⁰ and local legislatures.¹²¹ In a 1951 decision, *Tenney v. Brandhove*,¹²² the Supreme Court first considered the clause in the context of a suit filed against state legislators. The plaintiff, who was summoned as a witness before a state legislative committee, brought suit for damages against the members of the committee charging that the defendants were conducting the hearing to harass the plaintiff and deprive him of his freedom of speech. At issue was whether the legislative protection afforded a member of the California legislature constituted defense to a suit brought under the Civil Rights statute.¹²³

The Court held that an immunity much like that explicitly given to Congressmen by the Constitution also existed implicitly for state legislators.¹²⁴ The Court was even more specific in establishing certain prohibited grounds for imposing liability upon legislators: "The claim

118. 42 F.2d at 784.

119. See G. BLAIR, *AMERICAN LEGISLATURES* 138 (1967).

120. *Van Riper v. Tumulty*, 26 N.J. Misc. 37, 56 A.2d 611 (1948).

121. *Larson v. Doner*, 32 Ill. App. 2d 471, 78 N.E.2d 399, 401 (1961). However, some early cases suggested that a qualified immunity existed in some local legislative bodies below the state legislature, such as city councils, boards of supervisors, etc.; *Greenwood v. Cobbey*, 26 Neb. 449 (1889); *Henry v. Moberly*, 6 Ind. App. 490 (1892), and others. See generally, Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L. REV. 131 (1910).

122. 341 U.S. 367 (1951).

123. 42 U.S.C. §§ 1983, 1985(3) (1970).

124. 341 U.S. at 372-75.

of an unworthy purpose does not destroy the privilege."¹²⁵ Therefore, one can go further and state that the privilege in question is an absolute one, which shields the legislator from liability for damage done by his acts and statements, made or done in his official capacity, even though they are knowingly wrong or false and motivated by personal malice on his part. Although since 1972 in three almost consecutive cases, *United States v. Brewster*,¹²⁶ *Gravel v. United States*,¹²⁷ and *Doe v. McMillan*,¹²⁸ the Supreme Court substantially limited the scope of the legislative privilege as it was previously thought to exist, the integrity of the absolute immunity of congressional speech within both Houses from libel or slander seem not yet to have been directly challenged or curtailed by the Court.¹²⁹ The precedents that established absolute privilege in state and local legislatures are also intact.

The justification for giving legislators absolute immunity from libel or slander actions is essentially the fear that honest speech might become the basis of liability. Exaggeration or vehemence of language may furnish evidence of ill will whose appearance suffices to prove malice sufficient to support an action. Moreover, a jury may find that an absence of reasonable grounds for belief in the truth of a statement, however genuine that belief may have been, satisfies the requirement of malice.¹³⁰ Thus, broad definitions of malice and the difficulty of controlling juries necessitate an absolute immunity from libel and slander actions.

On the other hand, still recognizing that the underlying reason for so drastic and rigid a rule is the overbalancing of the individual injury by the public necessity, it would be preferable that some legal

125. *Id.*, at 377.

126. 408 U.S. 501 (1972).

127. 408 U.S. 606 (1972).

128. 412 U.S. 306 (1973).

129. Under these cases, many activities normally performed by Congressmen were excluded from protection: members of Congress can no longer independently acquire information about the activity of the executive branch, nor report such information to their constituents without risking criminal prosecution. Not only the legislators, but also many commentators vehemently denounced the Supreme Court for its decisions; see Ervin, *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175-95 (1973); Cleveland, *Legislative Immunity and the Role of the Presentative*, 14 N.H.B.J. 139-55 (1973); Cella, *The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality*, 8 SUFFOLK L. REV. 1020-95 (1974); Reinstein & Silverglate, *supra* note 104, at 1148-71.

130. 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* 453 (1956).

recourse be available to the individual when a congressman wrongfully sullies his reputation.

Since the fundamental purpose for legislative immunity was to allow the legislator to discharge freely his responsibilities to his constituents without fear of executive interference or accountability before a possibly hostile judiciary, it was not intended for the personal benefit of the legislator. The privilege exists to protect the interest of citizens in good legislation. As Mr. Justice Frankfurter stated, "legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good."¹³¹ Of course, telling lies on the floor of the Congress does not promote the interest of the citizen, but the loss of the privilege would, it is argued, paralyze the legislature.¹³² Therefore, a compromise should be sought to protect the exercise of the legislative function on the one hand and personal interest on the other. Moreover, the privilege serves as an additional safeguard to assure separation of powers and the coequal status of Congress. In construing the doctrine of legislative immunity and in defining its scope, the courts must reconcile the control of the aberrant conduct of individual legislators with the appropriate measure of respect that should be accorded a coordinate branch of the government.¹³³

As the basic purpose of the freedom of legislative activity is the interest of good government, it can hardly be argued that statements which the legislator had reason to believe not to be true are conducive to the proper conduct of legislative business. It seems inconsistent with justice that we insist that no man be deprived of life, liberty, or property without due process of law and that just compensation shall be awarded for private property taken for public use, but then permit a man's often regarded most precious property, his good reputation, to be taken from him wrongfully without allowing him one iota of legal redress. Furthermore, it is admitted that slander by a legislator carries more opprobrium than slander by an ordinary citizen.¹³⁴ To consider every malicious slander uttered by a citizen who is a

131. *Tenny v. Brandhove*, 341 U.S. 367, 377 (1951).

132. The overriding importance of this privilege is stated by Story, who asserted that the "other legislative privilege would be unimportant or ineffectual without the great and vital privilege of freedom of speech or debate." See Note, "They shall not be Questioned. . . ." 3 STAN. L. REV. 486, 489-90 (1957).

133. Note, *The Scope of Immunity for Legislators and Their Employees*, 77 YALE L.J. 366, 385-86 (1967).

134. See Oppenheim, *Congressional Free Speech*, 8 LOYOLA L. REV. 1, n. 3 (1955-1956).

representative as within his privilege because it was uttered within the walls of the legislative chamber, would render the legislature a sanctuary for calumny.

Most scholars argue that the privilege of legislative immunity which is a bar to a legislator's civil or criminal action in a given case does not mean necessarily that he will not be punished for his transgressions, because, at least in the United States, the legislature has the power to reprimand or expel misbehaving members.¹³⁵ Although the power to punish members is broad, congressional self-discipline for misconduct has been rare and, as a practical matter, cannot be relied upon to vindicate those injured by legislative malfeasance. Congress in this aspect has been notoriously slow and exceedingly reluctant to apply its own palliatives to instances of legislative slander. It is said that Congress has only tried eighteen times to purge itself of its "unhealthy" elements and most of them involved Southern Congressmen during the days immediately preceding the Civil War.¹³⁶ Since the legislative body has not been too much concerned over ordinary vituperation, it is not surprising to find that there are almost no cases of either a Senator or Representative being actually disciplined for saying anything about anybody.¹³⁷ As late as 1954, the Senate did condemn one of its members for insulting language about fellow members. But the charges against the same Senator for grossly insulting a general in the United States Army failed to pass the Congress. This clearly indicated that an outsider receives less protection via legislative self-discipline than does the legislature's members.¹³⁸

Moreover, the suitability of the legislature's making such a determination is highly questionable. The late Dean Roscoe Pound, after carefully researching and evaluating what he called "examples of legislative justice," concluded: "it may be said without hesitation that in action it exhibits all the bad features of justice without law."¹³⁹ The absence of procedural safeguards and appellate review makes a

135. U.S. CONST. art. 1 § 5. *See generally*, Cella, *supra* note 104, at 37-41.

136. Oppenheim, *supra* note 134, at 27.

137. *See* CHAFEE, *supra* note 104, at 88-89.

138. The only successful case punishing a member for words doing injury to a non-member is the case of Theodore Bilbo; *see* Smelser, *Legislative Investigation: The Problem in Historical Perspective* 29 NOTRE DAME LAW 163, 190 (1954).

139. He illustrated the following features: (1) was unequal, uncertain, and capricious; (2) was often influenced by personal solicitation, lobbying, and even corruption; (3) has always been highly susceptible to the influence of passion and prejudice; (4) has often been affected by the preponderance of purely partisan or political motives as grounds for decision; and (5) has been disfigured very generally by

trial by the legislature itself a more effective method of harassment than prosecution by the executive in a judicial forum.¹⁴⁰ Of course, it is conceivable that its undesirable nature becomes more obvious when the constitutional rights of a private citizen, not its own member, have been affected.

Since the judiciary in any country, particularly in the United States, has always borne the institutional responsibility for protecting individuals against unconstitutional violations of their rights by all branches of the government, judicial review of unconstitutional legislative action should not be foreclosed whether that action takes the form of a statute or the conduct of an individual congressman.¹⁴¹ The historical development of the speech or debate privilege also evidences that it was developed toward protection against executive-motivated actions rather than private action. Nor does the latter generally represent so great an intrusion upon legislative function.¹⁴² Therefore, the Court's attitude toward private action, on the one hand, and executive-motivated action, on the other, could be different.

In this context, it is an unwarranted, simplistic view that all cases of libel or slander must be unredressed merely because the defendant is a legislator and accordingly that a petition from the private citizen who seeks to guard his privacy, his good name, and his cherished rights from the reckless advance of his legislators must be ignored. With the legislature at today's level of development, the original purpose of this legislative immunity securing the precarious situation of elective assemblies in the face of a powerful executive branch (often combined with the judiciary) is hardly compelling. The reason that it still exists is not to favor members in their private capacity, but to ensure the smooth running and complete independence of the legislature. Therefore, it should be related primarily to the exercise of legislative duties.

In the classic case, *Coffin v. Coffin*,¹⁴³ mentioned before, the Massachusetts Court clearly laid out the groundwork for a less generous view of immunity: "When a representative is not acting as a member of the house, he is not entitled to any privileges about his fellow-citizens; nor are the rights of the people affected if he is placed

the practice of participation in argument and decision by many who may not have heard all the evidence and participation in the decision. See Pound, *Justice According to Law, Part II*, 14 COLUM. L. REV. 1, 7-12 (1914).

140. *United States v. Brewster*, 408 U.S. 501, 520 (1972).

141. See Reinstein & Silverglate, *supra* note 104, at 1175.

142. *Id.*, at 1172-73.

143. 4 Mass. 1 (1808).

on the same ground, on which his constituents stand."¹⁴⁴ Accordingly, an action against a state legislator on the grounds that his challenged statement bore no relation to legislative matters before the chamber and thus did not pass the test of official conduct or official duty was upheld.

The Supreme Court also defined the scope of the speech or debate privilege in *Kilbourn v. Thompson*,¹⁴⁵ mentioned previously, as extending only "to things generally done in a session of the House by one of its members *in relation to the business before it*."¹⁴⁶ (Emphasis added.) Only with the case of *Cochran v. Couzens*¹⁴⁷ was the protection of privilege extended by the Court of Appeals for the District of Columbia to its utmost by closing the door to any challenge based on relevancy or pertinency.

This approach has been used by other democratic countries. Article 26 of the Constitution of the Fifth French Republic provides: "No member of Parliament may be prosecuted, sought, arrested, detained or tried as a result of the opinions or votes expressed by him in the exercise of his function."¹⁴⁸ The Italian Constitution has a similar provision: "Members of Parliament may not be proceeded against for opinions expressed or votes given in the exercise of their duties."¹⁴⁹ The Basic Law for the Federal Republic of Germany goes even further by imposing a clear restriction upon legislative privilege: "A deputy may not at any time be prosecuted or subjected to disciplinary action or otherwise called to account outside the *Bundestag* for a vote cast or a statement made by him in the *Bundestag* or any of its committees. This shall not apply to defamatory insults."¹⁵⁰ This was designed to prevent the misuse of parliamentary immunity as often happened in the Weimer Republic. However, a majority vote that the deputy involved should stand trial has to be secured from the *Bundestag*.¹⁵¹

Certainly the independence of the legislature would not be impaired by a requirement that when a legislator slanders an individual, his statement must in some way be related to and justified by his legislative role. It is unreasonable to argue that legislative

144. *Id.*, at 28.

145. 103 U.S. 168 (1880).

146. *Id.*, at 204.

147. 42 F.2d 783 (1930).

148. See generally, D. PICKLES, THE FIFTH FRENCH REPUBLIC 89 (1960).

149. Art. 68.

150. Art. 46.

151. See R. NEUMANN, THE GOVERNMENT OF THE GERMAN FEDERAL REPUBLIC 127-28 (1966).

privilege should inhere in a legislator even when he is not acting as a legislator or not engaged in activities related to his legislative duties. The purpose of the application of a relevancy test, with liability depending upon the relationship between actions and a valid legislative purpose, would require legislators to proceed with greater caution when individual rights are at stake without impairing the independence of the legislature.

Therefore, the decision of the Council of Grand Justices not to place the legislative immunity of the local legislator on an absolute basis can hardly be seriously challenged. We first note that statements made outside the chamber of the local legislature are not protected by immunity according to the related Organic Laws.¹⁵² Only those statements made in the session are protected. Interposing a relevance test as a condition precedent to the exercise of legislative privilege was the real significance of this decision. Of course, determining whether a statement is connected with the business of the legislature may not be easy, since the difference between related and unrelated is hard to define. A statement may appear unrelated superficially, but may nevertheless be indirectly related to the subject matter of the session. Therefore, a broad construction of the scope of legislative acts covered by the privilege should be followed. It is not warranted to hold a restrictive view that only in a matter technically before the legislature can the assertion of privilege come into play. "To make any legislative language or conduct before or after a matter under direct and immediate consideration on the floor unprivileged is to close off from immunity a wide area of legitimate, defensible, and necessary legislative activity."¹⁵³

Although the decision of the Council of Grand Justices was justified, the Control Yuan, which had asked for this interpretation for the Taitung County Council, reacted angrily; it was contrary to its expectation. A section of five members of the control Yuan was thus formed to study the materials relating to the legislative privilege of speech. They even went so far as to call on Kuan-shen Hsieh, the President of the Judicial Yuan. The opinions of both sides were so divided that no compromise was possible.¹⁵⁴ As a matter of fact, the president was not a member of the Council, nor did he have the right to vote during the conference. His influence is rather limited as we

152. See note 103 and the accompanying text.

153. Cella, *supra* note 104, at 30.

154. For details, see Chou, *The Division of the Control Power and Judicial Power*, 19 CHENG-CHIH PING-LUN (China Political Review) 10, 11 (1967).

mentioned before.¹⁵⁵ Based on the recommendation of the section, the Control Yuan reached a resolution calling for the Council of Grand Justices to reconsider its previous decision.¹⁵⁶ Since the Council has full discretion in reviewing the application for decision, it was obvious that it was not persuaded, because it never entertained this question again.

Eleven years later in December 1978, this question again became headline news. Following unprecedented gains in the local election on November 19, 1977, several prominent anti-Kuomintang candidates successfully made their way to the Taiwan Provincial Assembly¹⁵⁷ as well as the county executive and equivalent mayoral positions.¹⁵⁸ During an educational interpellation on June 5, 1978, Yueh-chiao Su Huing, a newly elected but long-time anti-Kuomintang assemblywoman, used some harsh language, such as "lousy," "incapacitation," "mental abnormality" against Kuo-chen Feng, Principal of the Provincial Taichung College of Nursing, about the punishments suffered by two offshore students in that school. Another assemblywoman, An Chiang, immediately intervened by defending and encouraging Principal Feng. Su Huing then denounced Chiang as a "tramp." Although Su Huing apologized to Chiang for using abusive language, the latter did not accept the apology. After six months both Chiang and Feng brought action against Su Huing.¹⁵⁹

Since this dispute has not yet been legally resolved, comments before the court reaches its decision must be cautious. However, based on the principle approved by the Council and the attitude of broad construction towards the legislative privilege of freedom of speech, it

155. See Chapter IV at 88-89.

156. See CHIEN-CHA-YUAN KUAN-PAO (Gazette of the Control Yuan), no. 636, at 6845 (1967).

157. Though the central government has always been cautious not to allow the Provincial Assembly out of its control, the latter, nevertheless, has broad legislative power; see Cooper, *Political Development in Taiwan*, in CHINA AND THE QUESTION OF TAIWAN 46 (H. Chiu ed. 1979). Its purpose is to polish the stagnant image existing in the Legislative Yuan resulting from the withholding of re-election for over such a long period.

158. Among the seventy-seven members of the Taiwan Provincial Assembly, twenty are non-Kuomintang (the so-called Independent Person) people. Four of twenty county magistrates' positions and city mayors also fell into their hands. Although the percentage of their occupation (20-25%) did not constitute a serious threat to the Kuomintang rule, it is significant because the Kuomintang nominees have always controlled over ninety percent of the seats in local elections since 1949. For a detailed analysis, see Jacobs, *Taiwan 1978*, 19 ASIAN SURVEY 20-24 (1979).

159. The whole story was narrated in Cheng, *A Suit Between Three Women*, SHIH-PAO-CHOU-KAN (China Sunday Time), Jan. 28, 1979.

seems safe to conclude that Su Huing's speech should receive sympathetic consideration from the court.¹⁶⁰ Although her language was improper, even abusive to some people, it was uttered incidentally in the course of debate which related to a matter then before the Provincial Assembly. It is quite natural that some people tend to be emotional and have difficulty in controlling their temper. This is an ethical and personal matter. Following the result of the previous case of Yu-chiao Huang is highly advisable in this connection. Huang, also a non-Kuomintang freshwoman in the Provincial Assembly, scolded the Speaker, Houn-van Ts'ai, over a procedural matter on November 22, 1978 calling him an "s.o.b." A political compromise was reached and Huang was disciplined by the Assembly itself. Therefore, the legal procedure is not the only alternative in the case of disputation between legislators. After all, since local elections are regularly held,¹⁶¹ and the press is free to criticize the behavior of legislators, there is always the final assessment of the voters. If the public feels that a legislator has abused his privilege to an intolerable extent, his or her re-election may be sacrificed; a recall is also possible even before the expiration of the election term.

C. The Effect of Unconstitutionality

We now turn to the final phase of our analysis, which concerns the different effects of judicial review under the American and Chinese systems. After seven years' deliberation, the Council of Grand Justices on August 15, 1960 rendered Interpretation No. 86, holding that both the high courts and district courts shall be under the supervision of the Judicial Yuan. Because of the then-current judicial structure only the Supreme Court was under the jurisdiction of the Judicial Yuan, and these two lower courts were components of the Ministry of Justice, which in turn was a part of the Executive

160. On the basis that Su Huing had proposed to make an apology to Feng and Chiang and that she had shown a cooperative as well as repentant attitude during the trial, she received a four month prison sentence for the crimes of public insult and insulting a public official pursuant to arts. 140, 309 of the Criminal Code. However, the sentence may be commuted to a fine at the rate of NT.27 (\$.75) for each day of imprisonment (art. 41 of Criminal Code), *China Times*, January 19, 1980. The fine was considered not to be a burden for her. The sentence has been further reduced to two months when the case concluded. *LIEN-HO-PAO* (United Daily), July 24, 1980.

161. The term for an assemblyman is four years. In addition, it should be noted that since the voter turnout is generally high for local elections, political participation is rather intense and enthusiastic among local residents. The undemocratic practice often attached to the Republic of China by some foreigners is far from true in this respect.

Yuan.¹⁶² Since the arrangement not only impaired the integrity of the judicial system but also made judges in the lower courts susceptible to possible political influence, criticism of it was vigorous. The decision of the Council doubtless was a clear answer to this abnormality in the judicial system and required related statutes to be amended accordingly. Recognizing that its effect was far-reaching, these concerned governmental departments immediately organized a task force to undertake the work of amendment, but they produced nothing and, surprisingly, the old system still remains in operation almost twenty years later. Since this was the first (in fact, the only) case declaring statutes unconstitutional in the Republic of China, several questions need to be answered. Does the decision bind all future litigants or only those immediately before the Council? Is the newly defined constitutional structure to be applied retroactively or prospectively? If the answer is the latter, when does it become effective, the day of the promulgation of decision or some fixed days later? Will the nature of a case, for example whether it is civil or criminal, affect the decision?

The theory of constitutional litigation in the United States, namely, that constitutional issues are dealt with only insofar as they are relevant to the disposition of a concrete case or controversy, determines also the effect of adjudication upon a statute that is invalid. This basic nature of constitutional litigation makes it clear that review of the constitutionality of a statute takes place only when judgment in a concrete case occurs. No statute becomes the object of review aside from a real case. Since a constitutional issue arises only when it is relevant to the disposition of a case between opposing parties, the result of the finding that a statute is valid or invalid gives rise to no special form of decree relating to the statute itself. In other words, the constitutionality concerns itself only with the parties to the case but not with the statute itself. Therefore, according to the classic theory of American constitutional law, a court in finding invalidity does not repeal or annul the statute but simply refuses to take the statute into account. The statute remains on the books and may in effect be reviewed later if the decision finding it

162. The Ministry of Justice has shifted back and forth several times between the Judicial and Executive Yuan. Originally, it belonged to the Judicial Yuan. A change took place in January 1932 when it was placed under the jurisdiction of the Executive Yuan. From October 1934 onwards, it reverted back to the Judicial Yuan. In December 1942, it was again placed under the Executive Yuan. The Ministry of Justice is comprised of four divisions, a secretariat, and a number of committees. For details, see CHINA YEARBOOK 102-3 (1977).

invalid is later overruled or if other elements enter later to validate the statute.

The Chinese system is based on quite the opposite theory, which is modeled on Austria's Constitutional Court. Under this system, the decision of the Council invalidates the statute not only for the concrete case but generally for all future cases. In other words, when a statute is judged to be unconstitutional, it is invalidated for everyone just as if it had been abrogated by a subsequent statute. Articles 171 and 172 of the Chinese Constitution expressly provide that unconstitutional acts (statutes as well as administrative ordinances) shall be null and void. The theory of general nullity is clearly adhered to in respect of the effect. In short, when a statute is declared invalid, the decision makes it impossible for that law to be enforced thereafter. It becomes dead, inoperative for all purposes everywhere.

Superficially, these two systems are diametrically opposite each other. However, these theoretical views do not govern in practice. When the court adjudicates a statute's constitutionality, it obviously has decided more than the constitutional issue presented by the parties to the suit and in reality has determined the issue of constitutionality in such a manner that the decision would be binding should the issue afterwards arise in other cases between entirely different parties. Because of the force of the principle of *stare decisis*, the invalidation of a statute by the Supreme Court of the United States not only binds the judicial tribunal that ruled on the constitutionality but also binds the other courts, and all other branches of the government.¹⁶³

A further question may be raised about the retroactive effect of an unconstitutional statute as to past actions of individuals and of administrative and judicial officers in reliance on the statute. This is the area where a somewhat more substantial difference between the common and civil law systems can be found. Basically, there have existed two opposing theories, the retroactive and prospective. The former has been characterized as the Blackstonian theory. According to it, a judge's duty is not to "pronounce a new law, but to maintain and expound the old one."¹⁶⁴ The court's function, therefore, is to find

163. See R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 295-96 (1941).

164. 1 W. BLACKSTONE, *COMMENTARIES* 69 (1769). Another famous statement made by Blackstone on the next page is as follows: "For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was not law." (Emphasis in original).

the law as it existed when the controversy arose and to declare it as being the controlling principle in the case. In this context, by invalidating a statute as unconstitutional, the court does not annul but merely declares the preexisting nullity of the unconstitutional statute. In short, the statute has been void *ab initio*.¹⁶⁵ The latter has been characterized as the Austinian theory.¹⁶⁶ Arguing that law is constantly evolving, John Austin maintained that judges do more than discover law; they make it interstitially by filling in with judicial interpretation of the vague, indefinite, or generic statutory or common law terms.¹⁶⁷ Implicit in the Austinian approach is the admission that when a case is overruled, the earlier decision was, of necessity, wrongly decided. All the decisions are valid law until overruled, and all cases decided on the basis of an overruled decision are not to be disturbed. Retroactivity is abandoned in favor of prospectivity.

The United States is an outstanding example of the application of the *ex tunc* (retroactivity) doctrine. The Supreme Court in *Norton v. Shelby County* declared unequivocally that "an unconstitutional act is not a law; it confers no right; it imposes no duties, it affords no protection; it creates no office; it is in legal contemplation as though it had never been passed."¹⁶⁸ Mr. Justice Holmes was one jurist among those who supported this principle. In 1910, he wrote, "I know of no authority in the court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years."¹⁶⁹

Such pronouncements and their frequent reiteration throughout the years by many courts would lead one to believe that they express a universally accepted rule of law. A study of the decisions, however, readily discloses that some courts adopted a different rule where effect of the unconstitutionality only begins at the time the statute is

165. For this theory, see O. FIELD, *THE EFFECT OF AN UNCONSTITUTIONAL STATUTE* 3-4 (1935).

166. In addition to John Austin, Jeremy Bentham also attacked Blackstone severely; see J. BENTHAM, *THE WORKS OF JEREMY BENTHAM* 546 (1962). Even one of Blackstone's editors, William G. Hammond, indicated that "no . . . passage of Blackstone has been the object of more criticism and even ridicule than this." See W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 213 (W. Hammond ed. 1890).

167. For his criticism of Blackstone's retroactive theory, see J. AUSTIN, *LECTURES ON JURISPRUDENCE* 2:634, 1:36 (1885).

168. 118 U.S. 425, 442 (1886).

169. *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910).

invalidated. A retreat from traditional retroactive application began with the legislative divorce¹⁷⁰ and municipal bond¹⁷¹ cases where the injustice of complete retroactivity is obvious.¹⁷² *Chicot County Drainage District v. Baxter State Bank* was the leading case.¹⁷³ The Supreme Court said:

The past cannot always be erased by a new judicial declaration. . . . These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.¹⁷⁴

These departures clearly reflect the inherent defects of the principle of retroactivity. If a statute is pronounced unconstitutional from its inception, it should therefore always have been disregarded. Such a conclusion would throw everything into confusion. It may have existed for a considerable time and have become the legal basis for numerous transactions; it simply cannot be reversed without great hardship to individuals and danger to the legal and social stability of the community. It is recognized that retroactive overruling has been unfair to persons who justifiably relied upon previous judicial decisions. As Mr. Justice Cardozo, the major opponent of the principle, stated, it "frustrates the reasonable expectations of well-intentioned men."¹⁷⁵ Another major demerit is that the Blackstonian theory has done much to stifle progress in the law. If the courts understand that new rules would have full retroactive impact on all prior decisions despite possible extensive reliance on the old rule and burdens on the administration of justice, they would be inhibited from

170. *Bingham v. Miller*, 17 Ohio 445 (1848).

171. *Gelpecke v. City of Dubuque*, 68 U.S. (1 Wall) 175; see Thayer, *The Case of Gelpecke v. Dubuque*, 4 HARV. L. REV. 311 (1891); Reed, *The Rule in Gelpecke v. Dubuque*, 9 AM. L. REV. 381 (1875).

172. For details, see Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 916-21 (1962).

173. 308 U.S. 371 (1940).

174. *Id.*, at 374.

175. Cardozo, *Address Before N.Y. State Bar Association*, 55 PRO. N.Y. STATE BAR ASS'N, 263, 294 (Jan. 22, 1932); see also B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 146-49 (1921).

announcing new rules, thereby perpetuating the life of obsolescent legal rules.¹⁷⁶

In the criminal procedure area, there have been a series of cases where the acceptance of the technique of the opposite theory, prospective overruling, has been in evidence since 1965.¹⁷⁷ Although the Supreme Court has greatly expanded the scope of the constitutional commands which govern criminal decisions, it has sought to limit the effects of those new constitutional decisions by embracing the practice of prospective decision-making. Beginning with *Linkletter v. Walker*,¹⁷⁸ the Supreme Court held that the rule enunciated in *Mapp v. Ohio*,¹⁷⁹ which excludes illegally seized evidence from state criminal trials, would not be applied retroactively to convictions that had become final before the date of the *Mapp* decision. In *Johnson v. New Jersey*,¹⁸⁰ the convictions of two prisoners based upon confessions which would have been invalid under *Escobedo v. Illinois*¹⁸¹ and *Miranda v. Arizona*¹⁸² standards were still upheld by the Supreme Court, because their trial began before the date of those decisions. This was a shift from a finality of conviction rule to a trial date rule. However, it did not end here, and a further limit on the impact of newly articulated constitutional principles was imposed in *Stovall v. Denno*.¹⁸³ *Stovall* held that the right to counsel rule at post-indictment confrontations for identification purposes, which was derived from *United States v. Wade*¹⁸⁴ and *Gilbert v. California*,¹⁸⁵ applied only to confrontations which took place after the *Wade* and *Gilbert* decisions. Again the Court shifted from a trial date rule to the date of the

176. See generally, Spruill, *The Effect of an Overruling Decision*, 18 N.C.L. REV. 199, 213-14, 218 (1940); Stimson, *Retroactive Application of Law — A Problem in Constitutional Law*, 38 MICH. L. REV. 30, 47-56 (1939); Comment, 16 CIN. L. REV. 71, 72 (1942).

177. However, the seed of change was planted by Mr. Justice Frankfurter's concurring opinion in *Griffin v. Illinois*, 351 U.S. 12, 20, as early as in 1956. See P. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 189-90 (1970).

178. 381 U.S. 618 (1965).

179. 367 U.S. 643 (1961).

180. 384 U.S. 719 (1966).

181. 378 U.S. 478 (1964).

182. 384 U.S. 436 (1966).

183. 388 U.S. 293 (1967).

184. 388 U.S. 218 (1967).

185. 388 U.S. 263 (1967).

alleged violation as the criterion for determining who may take advantage of those new procedural protections.¹⁸⁶

The violation date rule has become the prevailing standard. The Supreme Court applied it to a number of cases which expanded procedural rights and improved the method of conducting trials.¹⁸⁷ However, the new restriction imposed upon the traditional retroactive effect also has its weaknesses. Most of all, it creates situations where some "similarly situated defendants" have the benefit of the new decision while those benefits are denied to others.¹⁸⁸ Employing the violation date rule will even result in different standards for the protection of constitutional rights being applied to defendants tried at the same time in the same courthouse for the same offense. Although the Supreme Court maintained that the parties involved are chance beneficiaries at an insignificant cost for adherence to sound principles of decision-making,¹⁸⁹ it is, according to some commentators, a significant departure from the demand of equal justice that similarly situated individuals be treated similarly.¹⁹⁰ Furthermore, this new rule puts a premium on delayed or protracted criminal prosecution as any court quickly bringing cases into a legal proceeding hinders a prisoner's chance of success in the future.¹⁹¹ This clearly conflicts with the constitutional mandate of giving an accused the right to a speedy trial.¹⁹²

In addition to the timing employed to limit the retroactive effects of unconstitutional overruling, the Court has produced the following conceptual framework within which the determination of retroactivity will be made in those above-mentioned cases¹⁹³:

186. For details, see Johnson, *Forward, The Supreme Court of California, 1967-68*, 56 CAL. L. REV. 1612 (1968).

187. *E.g.*, *North Carolina v. Pearce*, 395 U.S. 711 (1967); *Williams v. United States*, 401 U.S. 646 (1971).

188. *Desist v. United States*, 394 U.S. 244, 258 (1969).

189. *Stovall v. Denno*, 388 U.S. 293, 301 (1967).

190. See, *e.g.*, Rossum, *New Rights and Old Wrongs: The Supreme Court and the Problem of Retroactivity*, 23 EMORY L.J. 381, 404 (1974); Comment, *Partial Retroactivity: A Question of Equal Protection*, 43 TEMP. L.Q. 239 (1970).

191. The case of *Linkletter* is the best evidence of this situation. Linkletter's offense had been committed nine months after Mrs. Mapp's offense occurred. Since his Louisiana conviction became final a year before *Mapp* was decided by the Court, Linkletter became a victim of the new rule as a result of Louisiana's speedy handling of its caseload.

192. U.S. CONST. amend. VI.

193. There has been generated a substantial amount of commentary resulting from these cases; see Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201 (1965); Haddad, *Retroactivity Should be Rethought: A Call for the*

The certain guiding resolution or the question implicates (a) the purpose to be served by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards; (c) the effect on the administration of justice of a retroactive application of the new standards.¹⁹⁴

Among these three criteria, the purpose to be served by the new rule is the foremost consideration. The Court analyzes the purpose of a new rule in terms of two aspects of procedural process. The first aspect is that of ensuring the reliability of the guilt-determining process. The second aspect is that of ensuring respect for the dignity and integrity of the individual. If the primary purpose of the new rule is to remedy some aspect of the criminal trial which "substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdict in past trials,"¹⁹⁵ the Court will give the rule full retroactive effect. Belonging to this category were the requirement that counsel be furnished at the trial,¹⁹⁶ the time when the accused is asked to plead,¹⁹⁷ the rule requiring proof beyond a reasonable doubt,¹⁹⁸ the double jeopardy rule,¹⁹⁹ and the ruling concerning the death penalty.²⁰⁰ Conversely, if the purpose of the new rule is to halt illegal procedures which in themselves have no bearing on the reliability of the truth-determining process at the trial, the retroactive effect will not be applied since a new trial could not erase the violation to the individual defendant's right which had already occurred. The purpose to be served in this case is merely to protect the privacy of the individual or to improve police standards. In other

End of the Linkletter Doctrine, 60 J. CRIM. L. CRIMINOLOGY 427 (1969); Mishkin, *The Supreme Court 1964 Term — Forward: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965); Ostrager, *Retroactivity and Prospectivity of Supreme Court Constitutional Interpretations*, 19 N.Y.L.F. 289 (1973); Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719 (1966); Comment, *Linkletter, Shott and the Retroactivity Problem in Escobedo*, 64 MICH. L. REV. 832 (1966).

194. *Stovall v. Denno*, 388 U.S. 293, 297 (1969).

195. *Williams v. United States*, 401 U.S. 646, 653 (1971).

196. *Gideon v. Wainwright*, 372 U.S. 335 (1963). It has been followed without exception in every later case to reach the Court; *Loper v. Beto*, 405 U.S. 473 (1972); *Berry v. City of Cincinnati*, 414 U.S. 29 (1973).

197. *Arsenault v. Massachusetts*, 393 U.S. 5 (1968).

198. *Ivan v. City of New York*, 407 U.S. 203 (1972).

199. *Robinson v. Neil*, 409 U.S. 505 (1973).

200. *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Aikens v. California*, 406 U.S. 813 (1972); *Walker v. Georgia*, 408 U.S. 936 (1972).

words, when individual dignity and integrity are involved, the retroactive application is not necessarily justified. This group includes search through electronic surveillance²⁰¹ or in connection with an unlawful arrest,²⁰² police questioning leading to a confession,²⁰³ or the use of incriminating reports filed by the accused.²⁰⁴ Only when the purpose of the rule does not clearly favor either retroactivity or prospectivity will the Court apply a balancing test in which the second and third criteria come into play. The necessity and desirability of the new rule will be balanced against the extent to which courts and law enforcement officers have justifiably relied on the old rule, and the extent of the burden which would be imposed on the administration of justice by retroactive application.²⁰⁵

What is most notable when considering these cases in which retroactivity was an issue is that retroactive application is by no means a matter of course. Rather, the trend is toward prospective application. It seems apparent that the Court feels there are not many areas of constitutionally guaranteed rights remaining that so affect the truthfulness of the fact-finding process that retroactive application is required. Two cases may be cited here. The ruling that serious state criminal trials must be decided by jury was made wholly prospective,²⁰⁶ and the right to counsel at the preliminary hearing was denied retroactive application.²⁰⁷ Both seem to have involved the constitutional protections essential to a fair trial.

The merits of prospective application were first recognized in the 1920 Austrian Constitution, which provided that the judgment of annulment of an unconstitutional statute became effective on the day of publication of this decree.²⁰⁸ Therefore, this statute was thought to have been valid until it was pronounced unconstitutional by the Constitutional Court. In other words, the unconstitutional statute was not null or void, but merely voidable. Accordingly, the legal effect which the law had produced was valid. However, the legal result of the application of this theory was that the decision of the Constitutional Court should not have any effect upon the vary case pending before it. Recognizing this absurdity, the Austrians made a signifi-

201. *Desist v. United States*, 394 U.S. 244 (1969).

202. *Hill v. California*, 401 U.S. 797 (1971).

203. *McMann v. Richardson*, 397 U.S. 759 (1970).

204. *Mackey v. United States*, 401 U.S. 667 (1971).

205. *Johnson v. New Jersey*, 384 U.S. 719, 728 (1966).

206. *De Stefano v. Woods*, 392 U.S. 631 (1968).

207. *Adams v. Illinois*, 405 U.S. 278 (1972).

208. Art. 140(3).

cant modification in 1929 adding an exception by granting retroactive effect only on the very case over which the issue of constitutionality had arisen.²⁰⁹

The remarkable feature of the Austrian system is that its Constitutional Court can, if it deems necessary, prolong the validity of the statute for some duration of time. It has the discretionary power to order that the statute be annulled on a fixed date subsequent to the publication of its judgment. The period of prolongation is limited to no more than six months in the case of an administrative ordinance²¹⁰ and one year for a statute.²¹¹ Since the legislature will be able to enact a statute which is in harmony with the Constitution and which takes the place of the one that was abolished during this period, the advantage of avoiding a legal vacuum is obvious.²¹²

The benefit of the Austrian practice of postponing the effective date of an unconstitutional ruling was clearly recognized in West Germany and Italy. Both countries have developed techniques to accomplish the same result without formally declaring that the relevant statute is actually unconstitutional. The period following which an enactment will be unconstitutional is not necessarily limited to six months or one year.²¹³ The so-called "admonitory decision" is the practice that the Constitutional Courts in these two countries follow. Instead of declaring a statute unconstitutional, the Courts of these countries let it be known that unless the legislature takes action to repeal or amend it in the near future, the statute will

209. As a writer of the Austrian Constitution, Hans Kelsen, admitted, "this retroactive force . . . was a technical necessity because without it the authorities charged with the application of the law (that is, the judges of the Supreme Court and of the Administrative Court respectively) would not have had an immediate and consequently sufficiently cogent interest to cause the intervention of the Constitutional Court. . . . It is necessary to encourage them to present these requests by attributing in case of annulment a retroactive effect." See Kelsen, *Judicial Review of Legislation*, 4 J. POL. 183, 196 (1942).

210. Art. 139(2).

211. Art. 140. Turkey and Yugoslavia have similar provision, with only a six month period for both ordinance and statute; see art. 152(2) of the Turkish Constitution and art. 245 & 246 of the Yugoslav Constitution.

212. In view of the limited period of time, the criticism that the decision on the timing was not the interpretation of a constitutional norm, but a political decision, should not be taken seriously; see Geck, *Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices*, 51 CORNELL L.Q. 250, 284 (1966).

213. It is said that West Germany indeed considered emulating the Austrian system literally, but finally abandoned this idea, see Rupp-Brunneck, *The Federal Constitutional Court*, 20 AM. J. COMP. L. 387, 395 (1972).

become unconstitutional.²¹⁴ In practice, almost every appeal has had a fruitful result. Soon after the decision or at least within the stated time, the relevant legislative bodies will have repealed or amended the questionable provisions or will have replaced it with a new one conforming to the Constitution.²¹⁵ Some have denounced this novel function as interference with the legislative branch by the Constitutional Courts on the basis of political considerations.²¹⁶ In view of the nature of judicial review which empowers the court to safeguard the inviolability of the Constitution against all powers, including the legislative branch, and of the fact that decisions as to whether a statute is constitutional may often have far-reaching political importance, the criticism is ill-founded.

Since the Chinese Constitution has not provided an effective date for an overruling on grounds of unconstitutionality by the Council of Grand Justices, we must wait to see what answer practice will provide. As for the choice of retroactive or prospective effect, Chinese students of its Constitution almost unanimously support the latter mainly in consideration of the legal order and of the faith people place in it.²¹⁷ The advantage of these three European civil law countries' practice of prolonging the validity of an unconstitutional statute was acknowledged by some of them and at least by one well-known constitutional scholar, C.T. Lin, a three-term Grand Justice, who strongly suggested following the Austrian practice.²¹⁸

214. It is noteworthy that Italian courts have devised several methods of achieving this objective. They include a recommendation, a kind of peremptory exhortation sometimes inserted in opinions; a binding suggestion, suggesting the criteria to which a future law must conform if it is not to be void for unconstitutionality; and the suspension of publication of a judgment. For details, see Vigoriti, *Italy: The Constitutional Court*, 20 AM. J. COMP. L. 404, 406-11 (1972).

215. Several important instances in West Germany have been illustrated in Rupp-Brunneck, *supra* note 213, at 392-99. As for the Italian cases, see *id.*, at 408-11.

216. Rupp-Brunneck, *id.*, at 400.

217. See Kuan, *Several Questions about the Exercise of Power of Judicial Review*, 41 FA-LIU-PIN-LUN (China Law Review) 8:3-8 (1975); Lin, *A Problem in the Application of the Organic Law of the Council of Grand Justices*, 10 FA-LIN-YUAN-KAN (China Law Monthly) 2:3-5 (1959); Shih, *How to Interpretate the Constitution*, 17 FA-HSUEH-TSUNG-KAN (China Law Journal) 15-16 (1960).

218. See C. LIN, CHUNG-HUA-MING-KUO HSIEH-FA CHU-TIAO-SHIH-YI (A Detailed Study of Articles of the Chinese Constitution) 81-82 (1975). Quoting the suggestion made by Lin, another student of constitutional law, C. Gen, implied his support in *The Study of System of Judicial Review in Our Country*, 5 KUO-LI-CHENG-CHI-TA-HSUEH HSUEH-PAO (National Chengchi University Journal) 271, 304-5 (1962). Perhaps due to the lack of information, nobody pays any attention to the admonitory function of the Constitutional Courts in Italy and West Germany.

Because this system not only avoids the undesirable confusion of sudden interruption of the continuing legal order, a result of an unconstitutional decision, but also offers both breathing space and freedom to maneuver, its adoption should be given serious consideration. It is also important that the Council should declare the statute in question inoperative during the period of legislative deliberation, regardless of whether it was formally declared unconstitutional, and should suspend its effective date for a limited period as in the Austrian practice or direct a strong appeal to the legislature to correct it as in Italy and West Germany. Otherwise, it seems unjust that a statute should still be applied after its constitutionality had been placed in serious doubt by the competent authority.

Because judicial review in the Republic of China has not yet been firmly established and recognized, the Council of Grand Justices is in a position to play a leading role in shaping the proper function of this crucial system. Therefore, in pronouncing a statute unconstitutional, it should go further by fixing a date for such a pronouncement to be in effect, rather than vaguely stating that "the statute in question should be amended to conform with the Constitution" as in the case of Interpretation No. 86. Otherwise, an undesirable result could follow when the legislature and executive branches delayed, intentionally or unintentionally, their required amendment work. In such a case the Council would merely stand still, unable to resort to anything.

Not only for those countries who have adopted the prospective principle, but also for the Americans and Germans who have followed the retroactive theory, the question of the prior validity of an unconstitutional statute is a thorny one in practice. As indicated earlier, Austria departed from the pure *ex nunc* maxim by giving the concrete case which gave rise to the request for the unconstitutional ruling; so too have the United States and West Germany. The modifications made during the last decade by the Supreme Court in the area of criminal procedure are significant enough to have warranted a comparatively detailed examination in preceding paragraphs. West Germany also made efforts to solve the problems stemming from retroactivity as follows. If a statute involves a civil case, it shall remain in effect despite the invalidation of the now unconstitutional statute; but if the judgment has not yet been enforced, it cannot now be enforced. In cases where the judgment has been enforced by the executive or the party has already voluntarily paid, there is no restitution claim permitted. In short, what has been enforced stays enforced, and what has not been paid cannot be collected. But the picture is entirely different in a criminal case. A

final criminal sentence based on a voided statute is always open to review.²¹⁹ Anyone convicted under a statute that has now been held unconstitutional, regardless of when the conviction became effective, has a right to a new trial, presumably even if he has long since been released from jail after having completed his sentence. Because of the great interest of the individual and society in personal liberty and freedom in the criminal case, the different treatment of retroactivity in regard to criminal laws is warranted. In this respect, retroactivity is rather absolute in West Germany as compared with the gradual restrictions imposed by the United States Supreme Court.

The necessity of allowing retroactivity as to the very case which generated the request for considering the constitutionality of a statute has not been fully appreciated in the Republic of China. When the Legislative Yuan was deliberating over the Organic Law of the Council of Grand Justices, the opinion of the Committee of Judicial Affairs, which is responsible for the legislative draft, was that the original case should benefit from this unconstitutional overruling and the Law of Civil and Criminal Procedure should be amended accordingly.²²⁰

However, this proposal was killed on the floor for a variety of reasons. Some based their opposition on the principle of *ex post facto*. Others suggested that this would create a trial of a fourth level and thus disrupt the legal structure. The most significant attack on this required amendment procedure was based on its conflict with the underlying nature of retrial in both civil and criminal procedure. Only by finding new evidence or discovering new facts which had not been taken into account in the original final judgment could the action of retrial be instituted according to the Law of Civil Procedure²²¹ and Criminal Procedure.²²² Since the decision of whether a statute is unconstitutional is related to the review of the constitutionality of a statute, it is thus an abstract legal interpretation and has nothing to do with factual setting. Although this attitude represented the narrow outlook of the legislators, it pre-

219. Law Concerning the Federal Constitutional Court, § 79, cited in Cappelletti & Adams, *Judicial Review of Legislation, European Antecedents and Adaptations*, 79 HARV. L. REV. 1223, n.47 (1966).

220. See LI-FA-YUAN-KUAN-PAO (Gazette of the Legislative Yuan), 21st, 10th sess. 51 (1958).

221. Art. 496.

222. Art. 420.

ailed in the course of debate and finally prevented the passing of the desirable amendment.²²³

The adoption of pure prospectivity doubtless diminishes the incentive to apply for a consideration of constitutionality since the party itself cannot expect to realize any benefit from the unconstitutional overruling. This may have contributed to the scarcity of applications to the Council in the past.

223. See LI-FA-YUAN-KUAN-PAO (Gazette of the Legislative Yuan), 21st, 13th sess. 12-13; 14th sess. 10-11; 16th sess. 52-61 (1958).

CHAPTER V

CONCLUSION

Our review of the record of the Council of Grand Justices has clearly shown that its role in the Chinese political system has been one of restraint. It has some visibility and prestige, but neither is especially high. Its relatively low visibility may be desirable, however. Employing a strategy of restraint in its early period has laid a firm foundation for its later development. Since the system of judicial review is a political institution transplanted in a foreign context, it definitely needs time to take root. It is wise to be cautious in the beginning, for excessive exercise of this novel judicial power might well result in its destruction.

This may partially explained why the Council of Grand Justice has generally taken a position of flexible application of the Constitution in the light of special circumstances created by the Government of Republic of China's removal to Taiwan in 1949, thus serving the legitimizing function of judicial reviews suggested by Justice Cardozo.¹ However, in a few cases, it did try to exercise its function of checking the power of the executive and the legislative branch of the government.

Admittedly, American judicial history has amply shown that the legislature, composed of the people's representatives, has made not a few oppressive enactments under which people have suffered. It has also recorded how the judicial branch has protected individual rights, the rights of minority groups in particular, more than the other coordinate branches of the government through the system of judicial review. Therefore, in the exercise of the power of judicial review, the courts are generally pictured as a buffer and redeemer for the citizen in his eternal battle against the state.

1. Perhaps it was Mr. Justice Cardozo who initially theorized the legitimizing functions of judicial review; see B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 102-3 (1921). Two Yale law professors, Charles Black and Alexander Bickel, were the most prominent supporters of this argument; see C. BLACK, *THE PEOPLE AND THE COURT* 223 (1960); A. BICKEL, *THE LEAST DANGEROUS BRANCH* 29 (1962). This function also appeared in the Constitutional Courts of West Germany and Italy; see Kommers, *Judicial Review in Italy and West Germany*, 20 *JAHRBUCH DES OFFENTLICHEN RECHT DER GEGENWART* 111, 131 (1971).

Since it began to function fully in 1952, the Council of Grand Justices has only once declared in a decision that some statutes are unconstitutional.² It goes without saying that this extremely low figure of unconstitutionality surprises some people in view of the rapid extension of the boundaries of governmental activities in recent years. Politicians in the government are inclined to say that the reason why the Council has refrained from declaring laws unconstitutional is simply that the legislature and executive organs in the government have been scrupulous of the people's fundamental liberties. They further maintain that many appeals have obviously relied on flimsy arguments and have been mainly made for delaying purposes. However, we submit from the preceding discussion that the Council has not been in the forefront of the fight for the realization of civil liberties in the Republic of China. While the Council has generally paid lip service to the Principle of Chapter II (Rights and Duties of the People) of the Constitution, it has not struck any resounding blows for their effective implementation.³ Does this mean that total responsibility should fall on the Council? How is this attitude of self-restraint on the part of the Council to be explained?

Perhaps the answer lies partly in the weight of tradition. Before the establishment of the Council of Grand Justices, no court had the power to rule on the constitutionality of a statute or an administrative ordinance. Also, the tradition of civil law which emphasizes the highly technical and conceptual approach has always permeated the

2. Interpretation No. 86, rendered on August 15, 1960. This record can be compared with that of Japan. Not until 1973 did the Supreme Court of Japan make the first clear decision of unconstitutionality (Patricide Case), though it did on two borderline cases hold governmental actions unconstitutional in 1953 (*Sadagami v. Japan*) and 1962 (*Nadamura v. Japan*). This case has further significance since it also overturned the 1950 judgment upholding its constitutionality. Of course, the number of decisions invalidating legislative acts cannot be the only criterion to test an efficient exercise of judicial review. Even in the United States, where the exercise of judicial review has been considered successful, the Supreme Court invalidated acts of Congress only twice during its first seventy-five years of existence. Moreover, among the one thousand cases involving unconstitutional decisions, nine hundred were state statutes and only about one hundred federal statutes have been invalidated for unconstitutionality. See H. ABRAHAM, *THE JUDICIAL PROCESS* 280 (1975). This clearly buttresses the oft-quoted Holmes dictum: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think that the Union would be imperiled if we could not make that declaration as to the laws of the several states." See O. HOLMES, *COLLECTED LEGAL PAPERS* 295-96 (1920).

3. It is interesting to note that Professor Nathanson arrived at the same conclusion about the Supreme Court of Japan, *Human Rights in Japan through the Looking Glass of the Supreme Court Opinions*, 11 *HOWARD L. J.* 318, 323 (1965).

judiciary. In this context, the reluctance to undertake unaccustomed socio-political examinations appropriate to constitutional adjudication is quite understandable. As a result, the Council has often confined itself to taking judicial notice of the stated object of statutes and has refrained from scrutinizing them in detail, preferring an interpretation which will support the constitutionality of an act, if more than one interpretation is possible. In addition, the succeeding appointments of Grand Justices by the same Kuomintang which has been in power for these thirty years has also made the decision that a statute or an administrative order is unconstitutional only remotely possible.

Several remedies are suggested here. Lawyers should be recruited for membership in the Council. The qualifications for a Grand Justice enumerated in the Governing Law do not include experience of practicing law. This absence doubtlessly reflects the low status of lawyers and the legal profession in traditional Chinese society. A lawyer had customarily been called a "litigation trickster" or "litigation stirrer" — a name hardly likely to uphold the lawyer's social standing or to inspire bright young persons to join the profession. Although this picture has gradually altered as a result of recent industrialization and urbanization that produced enormous changes in Taiwan's social life and her law and which have in turn increased the demand for legal counseling, the lawyer still has a long way to go. Reserving a fixed number of seats in the Council for lawyers would definitely contribute significantly to their own efforts to raise their status. After all, lawyers are legal experts who are presumed to devote many years to the protection of the rights of the people. It is thus absolutely necessary to have them in the Council as Grand Justices who bear the responsibility of protecting human rights. However, as compensation for the sometimes great financial sacrifice of lawyers, the salary of the Grand Justices should be reasonably adjusted and, more importantly, the symbolic significance of the Council should be further strengthened in order to make appointment worthwhile despite the possible sacrifice it entails.

The Council's other function is to unify the conflicting interpretations of statutes or administrative orders made by government agencies that do not necessarily relate to the Constitution. This has become the major work of the Council; judicial review directly related to the Constitution has been relegated to a position of secondary importance. Since no such function has been assigned in other countries' Constitutional Courts, the wisdom for retaining it in the Council is open to question. Its sole function should be limited to the task of interpretations directly related to the Constitution.

Other problems are of a technical and procedural nature. Since the required quorum for passing an unconstitutional decision is extremely high, a disproportionate weight is attached to the minority's veto power; this severely impedes the proper exercise of judicial review. The number required for a quorum and for concurrence should be relaxed somewhat. In view of the far-reaching consequence of an unconstitutional decision, a simple majority would not be sufficient and the two-thirds standard seems a desirable compromise. The condition imposed by the Council itself which states that only after the principles or syllabus of the case have been decided (which do not necessarily accompany the supporting opinions) can a different opinion be submitted within five days also needs to be reconsidered. Not only is the period unreasonably short, but it is unlikely that a sensible and justifiable concurring or dissenting argument can be reached before reviewing the full text of the majority's supporting opinion. The effect of unconstitutionality should also be extended retroactively to the concrete case which raised the question of constitutionality. Otherwise, without the incentive of personal benefit, it is unlikely that anyone would bring an application to the Council.

However, we have to admit that the success of the system of judicial review cannot merely depend upon the Council itself. The Council cannot do what the society itself must do and fails to do. In other words, the ability of the Grand Justices to influence the course of constitutional development depends largely on the political and legal environment in which judicial review operates.

Not only the general public but also public officials lack sufficient knowledge about the function and the procedure of the Council of Grand Justices. This may have been the major impediment to the sound development of a system of judicial review in past generations. Several explanations can be given.

The system of judicial review is absolutely novel to the traditional Chinese conception of law and government. The doctrine of rule of law which underlies this system is also foreign to it. Throughout their history, the people governed not so much by formal law as by a sense of morality and reason. Morality, not justice, was considered the end of government. The law was considered merely a tool for the enforcement of morality. In short, law was subordinate to morality. Hence, we can hardly expect the Chinese to have developed an adequate tradition of respect for law. As the basic purpose of judicial review is to keep government functions within their constitutional limit, the absence of a respect for law on the part of those who govern

makes this goal difficult to achieve and at the same time increases the possibility of public apathy on the part of the governed whenever their constitutional rights are violated.

The Chinese preference for mediation in various extra-legal bodies rather than the formal legal procedure to settle disputes also contributes to the absence of a consciousness of their legal rights. In the process of mediation, not only have custom and morality been the guiding principles, but also each side has been urged to make certain concessions. Thus, parties' rights often have been compromised in order to reach an harmonious result.

Another factor which has prevented the development of judicial review in the Republic of China is the traditional and peculiar relation between the Chinese rulers and the Chinese people. Generally, the Chinese were not bothered by the government so long as their legal share of taxes was paid and, on the other hand, they did not care much about the ruler as long as he did not intolerably misuse his power. Whenever any ruler overstepped his authority, he could be ousted by the people on the familiar ground that he lost the mandate from Heaven. But the people never attempted to change their governmental system by revolution until the twentieth century. In other words, their interest was exclusively centered on the personal character of the ruler who held the reins of authority. As a result, when they overthrew a ruler, they never wished to govern themselves.⁴ Not only did national politics seem very remote to the Chinese people, but even the work of local government did not interest them, though they may have had some experience in family matters or even village social affairs. This attitude of indifference to politics carries weight among the Chinese of today who still desire not to govern themselves but rather to be well-governed. Therefore, when any new institution is forced on them, it comes as something

4. A famous Chinese politician and academic observed:

Lincoln's definition of democratic government "of the people, by the people, and for the people" is in part within the thinking of Chinese philosophers. "Of the people, and for the people," are essential to their thought. But "by the people," is a thought left untouched. That is, they believed throughout in the principles that the country is the common possession of the people, and the politics exist solely for the sake of their common advantage. But they neither studied the method nor even seem to have accepted the theory that government must be "by the people." And therein lies the fundamental weakness of China's political thinking. There is no point in speaking of the people as the foundation of the country, and then denying them all powers of participation in politics.

See C. LIANG, HISTORY OF CHINESE POLITICAL THOUGHT DURING THE EARLY TSIN PERIOD 10 (1930).

unfamiliar and artificial. It does not naturally and promptly engage popular interest and sympathy but is regarded with indifference.

Since judicial review was imported — no trace of this system having been found in Chinese tradition — a period of transition and adaptation is understandably necessary. We have to bear in mind that the present status of the American judiciary and its competence in the exercise of the power of judicial review is based upon a long history of 176 years. The Council of Grand Justices, with only 28 years of history, is still relatively inexperienced in exercising the delicate duty of judicial review. It is unreasonable to expect the Council of Grand Justices to have attained as noble a status in the Chinese political process within such a short period as that of the United States Supreme Court in the American political process in view of the totally different conditions which have influenced their respective development. Not only were a fully developed legal literature of common law and a people brought up on belief in the law and its courts absent in the Republic of China, but also her legal education and organized bar association have needed improvement for years.

Moreover, the exigencies created by the continuing threat from the other side of the Taiwan Strait have also narrowed the boundaries of judicial policy-making by the Council. It is understandable that the right of self-preservation of the Republic of China has always been given precedence. In fact, when we consider the fact that Taiwan is a small island with a large and dense population, we have to admit that any disturbance — economic, social, or political — will spread rapidly, and it becomes imperative for the government to nip all problems in the bud before they become unmanageable. At times, overreaction to danger is a common national response. The violation of human rights of American citizens of Japanese ancestry during World War II can be cited as a clear example.

However, the political environment is undergoing change as the Republic of China enters its third decade of existence in Taiwan. Although the declared political ideology and the framework of the government have changed little since 1949, pragmatism has been emphasized and a change in substance which is taking the form of internal reforms is occurring. The failure of the Republic of China on the mainland obviously taught those now residing in Taiwan a painful lesson and made them realize that reform was desperately necessary. This trend spread more speedily after 1972 when Ching-kuo Chiang assumed the premiership. In subtle ways he has revolutionized politics in Taiwan by functionally adjusting it to both internal

and external problems. More young people are recruited into the government, and the government itself has been made more honest and responsive to the public. Most of all, corruption which has always been attached to the government of Nationalist China has become less prevalent.⁵

Without this efficient political reform, the impressive record of Taiwan's economic growth simply could not have been achieved. On the other hand, the rapid economic growth also has had an undeniable impact upon the political development. People are the major beneficiaries when the function of government is made more efficient and free from corruption and red tape in order to maintain economic growth. Moreover, the fruit of economic growth has not been limited to businessmen alone. The economic disparity often accompanying rapid economic growth in other developing countries did not appear in Taiwan.⁶ Her equitable income distribution has obvious significance: It broke the barriers between different social groups, whether they existed for a long time or have emerged out of the economic development.

The rising standard of living in Taiwan has also facilitated a rapid expansion in education. It is estimated that from 1954 to 1974 the percentage of the population in secondary schools increased almost five times and the percentage in institutions of higher learning has increased nearly twelve times. At present, more than one-fourth of the population in the Republic of China are students — more than in England.⁷ But success in raising living standards and providing greater educational opportunities may pose some problems for the government. When food and reasonably secure jobs can be taken for granted, other needs make themselves felt. The high literacy rate also makes the average Chinese able to be better informed about his political institutions. In addition, the self-government practiced in local governments has habituated the people to the idea that government is a matter to be discussed, and that its operation is subject to the criticism of the governed. Under these

5. For an excellent examination, see R. CLOUGH, *ISLAND CHINA* 33-68 (1978).

6. See Chinn, *Distributional Equality and Economic Growth: The Case of Taiwan*, 26 *ECON. DEVELOPMENT & CULTURAL CHANGE* 65-79 (1977). It was even said that there is now a more equal distribution of income in Taiwan than in either the U.S. or Japan; *N.Y. Times*, April 12, 1977.

7. Appleton, *The Social and Political Impact of Education in Taiwan*, 6 *ASIAN SURVEY* 703-20 (1976).

circumstances, the conditions required for more complete democracy have been met, and indeed the demand for more open and democratic political institutions on the national level was voiced. One major target was in the judicial area, which included the termination of the state of siege and the transfer of higher and district courts back to the Judicial Yuan according to Interpretation No. 86.⁸

The government at first did not pay enough attention to this new trend. After unceasingly monopolizing political power without any serious internal challenge for thirty years, it has accustomed itself to the status quo. However, a series of diplomatic setbacks since 1971 has weakened the authority of the government and the ruling party. After decades of political stability, economic prosperity, and international recognition, the survival of the government of the Republic of China as a politically autonomous entity was threatened. Facing an unfavorable international condition, the government considered it imperative to make further thorough reforms in order to accommodate internal demands and improve its image abroad. A series of political reforms has been put into effect.⁹ However, none of them have directly related to the judicial system in general and judicial review in particular.

The diplomatic deterioration reached its climax on December 15, 1978 when the United States abruptly severed diplomatic relations with Taiwan. Immediately after this unfortunate incident, several task forces were established to undertake the responsibility of studying further political reforms. One of the major suggestions of these task forces was the implementation of the Interpretation no. 86 rendered nineteen years ago by the Council of Grand Justices, to transfer both higher and district courts back to the jurisdiction of the Judicial Yuan. After few months deliberation, the government formally announced that the high and district courts will be transferred back to the Judicial Yuan within a year.¹⁰

8. However, the potential influence of those favoring a more complete democracy upon contemporary politics should not be overstated. Businessmen, for example, are concerned mainly with the efficiency and responsiveness of government rather than political ideology and principles. The public in general is influenced by traditional cultural factors in which some authoritarian practices are not regarded as undemocratic where individualism is considered less necessary, sometimes even undesirable. For details, see Cooper, *Political Development in Taiwan*, in *CHINA AND THE QUESTION OF TAIWAN* 76, 55, 72, 73 (H. Chiu ed. 1979). This attitude is also shared by contemporary young students in Taiwan. See CLOUGH, *supra* note 5, at 58.

9. Cooper, *supra* note 8, at 66-69.

10. CHUNG-YANG-JIH-PAO (Central Daily News) April 5, 1979.

This judicial reform undoubtedly is welcome news; after almost two decades' delay, the government has finally realized its duty to implement the decision of the Council and has firmly established the principle that government, like the people, also has an obligation to obey the law. Notwithstanding the lateness of its implementation, it is still a desirable improvement from the standpoint of judicial independence. It is definitely beneficial not only for the people but also for the government itself. Through genuine reform efforts a new image of the government emerges and its power in fact is further consolidated in the long run. After all, the rule of law cannot be achieved instantly. It is a process of evolution which may take several generations as in the western experience, and the important question to ask about the Republic of China, therefore, is not whether it is under the doctrine of the rule of law but whether it is moving toward that goal.

Finding that the government under internal and external pressure is committing itself to the rule of law, we also detect increasing evidence of growing popular awareness of the system of judicial review. Although often not well-informed, and generally not enthusiastic, some people do value their right to file a constitutional application with the Council, among other reasons, as affording them an opportunity to protest against a government violation. The decisions rendered by the Council since 1976 are all the result of individuals' applications. Therefore, one of the major services which the Council has performed so far has been to play a limited role in educating a largely lethargic public on the importance of their constitutional rights. For the traditional non-litigiously minded Chinese, this educational role makes a major contribution to the final realization of the rule of law.

On the other hand, evidence also indicates a willingness and readiness on the part of the Council of Grand Justices to review the constitutionality of legislative and executive actions. So, it too realizes that the political and social environment is changing and a new attitude about the function of judicial review is necessary.

In summation, we can safely predict that the outlook for establishing an effective judicial review in Taiwan is favorable, since through all these years of diplomatic setbacks, both the government as well as the people fully realize that only through continuing political reforms can they reap the rewards of economic growth. The best defense in a long struggle against totalitarian advances is a determined effort toward democracy. The existence and the further development of judicial review is an important index that shows the

willingness of those who govern and are governed to submit to a government based on law. This is universally accepted as the final goal of any modernized democratic country.

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